THE LAW REPORTER.

Vol. 1.] NOVEMBER, 1838. [No. 7.

THE LAW OF CORPORATIONS.

REMARKS ON "CHANCELLOR KENT'S OPINION."

(Published in the Law Reporter, No. 3. page 57)

NOTWITHSTANDING a sacred veneration for the name of Chancellor Kent; a profound respect for his professional character and an habitual confidence in the authority of his opinions, I cannot bring my mind to assent to the doctrines of the opinion referred to. He affirms, that a corporation created for particular purposes in one state, may, through its agents, make all such contracts in other states, as would be valid, if made within the state in which the corporation is chartered. "Being competent for such purposes in the state in which they are created," he says, "they are competent to contract and sue every where; on the principle, that persons, as to personal contracts, have no locality; and persons competent to contract in one country are competent to contract in every other, saving and excepting always the case of the existence of some local and positive prohibition to the contrary. The *lex loci contractus* undoubtedly controls the validity of contracts; and that is on the ground of the necessary independence of nations. But apart from any such special exception, the law knows not any distinction, as to personal rights and contracts, between a single individual acting in his private capacity, and two or more individuals acting jointly as partners, or acting under legislative sanction, in a corporate capacity, and with a corporate name, as one single moral person." This constitutes the basis of the argument. But it seems to me, that there *is* a palpable distinction, as to personal rights and contracts, between a *single individual, acting in his private capacity*, and two or more, *acting under legislative sanction, in a corporate capacity, and by a corporate name.* A natural person has a corporeal existence, with powers to move from place to place, and he has certain natural, underived rights, which accompany him wherever he goes; among them, is the right to contract. Corporate bodies, have no corporeal existence, and cannot move from place to place, and they have no natural or underived rights. They have only an ideal existence, an existence in contemplation of law, and are known only by their rights and privileges conferred by positive statute. (See 2 Bac. Abr. Tit. Corp. and the cases there referred to.) The transitoriness which belongs to the individual, in his private capacity, and the legal rights which grow out of it, can have nothing to do with bodies corporate, as a corporation can only exist by grant, and can only exercise such powers and authorities as are delegated to it by positive statute. The making such grant, and the delegation of such powers, always involves a question of expediency: this requires legislative action. What may be expedient in one state, may not be deemed expedient in another; and because it is provided in one state, that a particular corporation be created with certain powers for particular purposes, it does not follow, that such purposes may be effected in another state, either by that or any other body politic. Before such powers can exist in any particular state, it must be granted by the law-making power of the state. Instead, then, of there being "no distinction, as to personal rights and contracts between a single individual acting in his private capacity, and a number of individuals acting under legislative sanction in a corporate capacity and with a corporate name, as a single, moral person" there is, as regards the present question, *no point of similitude.* The one has personal identity, corporeal existence, a right and power to move from place to place; his rights are inherent, and accompany him. The other has no personal identity, no corporeal or local existence; cannot move from place to place; has no inherent right either in one place or in another, but is a mere contrivance of the law-making powers of a particular state, to effect certain specified purposes, in a way that may be deemed to be expedient. There

is no shadow of ground, therefore, for saying, that because an individual may contract any where unless prohibited, a corporation may, likewise, do so. I say, as Sir William Jones, one of the most polite scholars of his age, said, in reference to the opinion of Sir Edward Coke, one of the most profound lawyers of his, or any other age, "I deny the first proposition — the reason — and the conclusion."

The learned commentator has confounded, in his argument, the right to sue with the right to contract. The one may well exist, and the other not. They depend upon different departments of the law. The right to contract, upon the *lex loci* — the right to sue, upon the *lex fori*. By the comity of nations, as the distinguished chancellor establishes, where a legal contract exists in one country, the parties to the contract are entitled to a regular standing in court; and having a legal standing for general purposes, all incidental rights and powers follow. Having taken cognizance of any particular case, courts will sustain their jurisdiction throughout, as was done in the case of *Henrique v. The Dutch West India Company*, (2 Ld. Raym. 1532, and 1 Stra. 612.) The cause of action in that case originated in Holland, where the corporation had a legal right to contract. The contract was adjudged to be legal. The recognizance of bail taken in England, upon which process afterwards issued, was taken in pursuance of the original jurisdiction. It was but a part of the means of carrying out the original remedy. It was subject to the *lex fori*, and suit could only have been brought upon it in England, and no where else. Having assumed jurisdiction of the substantive cause of action, the court could have no difficulty in taking cognizance of the incident. The whole case, therefore, only proves, that a foreign corporation may sue upon a lawful contract. The validity of the contract was no question in the cause.

If a corporation is the mere creature of the charter, which gives it being, with no powers, except what are granted to it directly or indirectly by the law-making power of the state creating it, has it by virtue of such grant, the right to contract and do business in its corporate name, through an agency, in another state than that from which it procures its powers? Delegated powers, cannot transcend the powers of the constituent. If one state can authorise a corporation to purchase bills of exchange, or deal in gold or silver bullion in another state, it can authorise the loaning of money, and these constitute all the legitimate objects of a bank. If the right exists, we may have the people of Charleston, or New Orleans, applying to the legislature of New York or New Jersey, for charters for banks or insurance companies—and the people of Virginia, going to Massachusetts for charters of incorporation for manufacturing establishments. They would the more likely go to the east, where such charters are so easily had, than apply at home, where they would not likely be granted. But it cannot be. It is a fundamental principle, applicable to all the departments of government, executive, legislative, and judicial, that the powers and jurisdictions created must be limited within the territorial limits of the government creating them. The executive of the state, whose duty it is to see that the laws be faithfully executed, cannot look beyond the state, in the performance of his duty. The legislature cannot give existence to, or authorise the exercise of any civil right beyond such limits. Executors and administrators appointed by the authority of one state, have no official power or authority in any other, *Wireman v. Mothland*, (3 Penn. Rep. 1851). As corporations can only be created by law, they cannot derive authority from one state, to transact business in another. And if the legislature cannot directly grant such authority, they cannot indirectly. It seems of necessity to follow, that if the original grantees of the rights and privileges—the corporators—could not themselves, through their legitimate board of managers, exercise such rights and privileges within the jurisdiction of another state, they could not act by a special agency. An agent can never claim any power which the constituent could not legitimately exercise. No one, either a single individual, or a body corporate, can delegate powers he does not possess. Nor can he authorise an act to be done, which the constituent could not do. If the legislature of Pennsylvania could not create a corporate body within the state of Alabama, to deal in bills of exchange, &c., it follows, that no body created by authority of Pennsylvania, could confer such power.

We have seen, that there is no inherent natural right in corporations. If it exists at all, it must be by virtue of a law of Pennsylvania conferring it; and if no such right can be conferred, it cannot exist. We cannot distinguish between the right to do one act and many acts of the same sort. Dealing in bills of exchange is one of the most important acts allowed to the bank of the United States in its charter. If it has the right, through an agent, to deal in bills of exchange, it may, "in gold and silver bullion," and it may discount notes and regulate exchange. But this does not go to the principle involved; it only shews the extent to which its adoption leads. We deny the legal right to make an executory contract for one bill of exchange, to the amount of one dollar. But further, a corporation for banking or other purposes, rests on personal confidence. Charters are looked upon with jealousy. They are drawn with scrupulous care and exactness. A precise scheme is prescribed, and fundamental articles established; and no corporate act can be done, except in accordance with the plan provided. A board of directors are generally appointed; a fixed number is required to constitute a *quorum*. No corporate act can be done except on stated days, or at a time fixed, and notice to all the directors. These powers are not assignable. No office, resting upon personal confidence—involving a trust—can be delegated. The great, leading objects of the institution can only be transacted in the mode contemplated in the charter. This the security of the government demands, and it is on this pledge, that charters are granted. If one agent, in a foreign state, can be appointed to deal in all or some of the things authorised in the charter, and can be cloathed with all or some of the powers of the institution, a dozen may be so appointed, and a dozen of agents, holding meetings daily or weekly for the transaction of business in the name, and by the authority of the original institution, would present an irresponsible body clothed with powers never conferred upon them by the state—with all the authority and dangers, and without any of the responsibilities of a legal board.

The bank of the United States is referred to in the opinion under consideration. The powers and authority of that institution were graduated by the legislature of Pennsylvania in accordance with the scale of responsibility imposed. A large *bonus* was demanded to the state for the privileges conferred. Efficient and ready means were provided for instituting suits against it—serving process—compelling appearance—levying executions, &c., far beyond any provisions of the common law; and for particular delinquences, the government of Pennsylvania reserved the right to revoke its charter. Can these peculiar responsibilities be evaded by instituting an agency beyond the reach of the laws of the state? or can the institution be virtually imposed upon other states, through agencies without any *bonus*, and without responsibility to their laws or government?

But there are still further difficulties. It is properly stated in the learned opinion refered to, that, by the precepts of the common law, "the competency or incompetency of persons, whether natural or artificial persons, to contract, and the lawfulness of the contracts which they may make, must depend as a general rule, on the law of the *place* where the contract is made." Suppose the contract under consideration, was made in Alabama. The corporation claiming to have made it, was created by the laws of Pennsylvania. The contract is valid or invalid, as is admitted, by the laws of Alabama. Was there any law of that state, giving a right to the corporation to contract? The contract could not be valid unless there were legal parties able to contract. By the laws of Alabama, there was but one party—the indorser of a bill of exchange. The state of Pennsylvania would not enact laws for Alabama. To enable a corporation any where to act, it must have legislative authority. Its purposes must be passed upon, and be deemed expedient. It is not, we humbly think, as the learned commentator states, that the expediency is presumed to exist, until it is prohibited. A right is claimed contrary to the common law—a right founded on a grant—one depending on doubtful policy, approved in some states and disapproved in others. It must first be declared to exist, before it need be prohibited. If the statute laws of Virginia should allow a married woman to contract, or prohibit an alien from contracting, it would

neither give the right to the one, nor take it away from the other, in any other state.

A necessary incident to a corporation, is the right to sue and be sued. It could not maintain its existence without this right; and it could not be endured without the responsibility. It can only sue and defend at common law by attorney; and, therefore, the proper process against it, is a *distringas*; Co. Lit. 66. Salk. 191. pl. 2. 2 Virn. 396. If it has neither lands nor goods, there is no way to compel it to appear either in a court of law or equity. *Thursfield v. Jones*, (Skin. 27. 1 Ventr. 351. Style. 367.) Now, if a corporation created in one state, can appoint its agents to transact business in its name in another, where it has no property, real or personal, according to the doctrine contended for, it may sue in that other state, but it cannot be sued ; and yet it demands of all other states a recognition as a legally existing corporation! It would seem to be enough for one state to demand the right to establish an agency in another state without its consent, on terms somewhat reciprocal ; but to claim the privileges, without the responsibilities, is pushing the principles of comity, further than any principle of the common law, the usage of merchants, or the general sense of mankind is willing to allow. It is no answer to say, a creditor may go to Pennsylvania and pursue his claim. It belongs to the people of the state in which the contract is made, and to their laws to determine if such a principle could be forced upon them without their consent.

There is some plausibility in the way in which the question is put, " whether a manufacturing corporation in New York, may not by its agents, purchase in Mobile or New Orleans, bales of cotton, or at Richmond, in Virginia, hogsheads of tobacco for the use of the manufacturing establishment in New York, and whether the courts in Alabama, Louisiana or Virginia, would hold the purchases to be void, and refuse all aid in behalf of the corporation to enforce performance ?" I would merely ask, in answer to this inquiry, if those states would duly regard their own character or interests, if they should lend their courts for the purpose of enforcing a contract against their own citizens, when they could not use them in their favor against the corporation ? Suppose an executory contract to be made in the manner above stated, and the corporation should refuse to comply—carry off the cotton or tobacco, and refuse payment, is there any judicial power in Alabama, Louisiana, or Virginia, capable of assuming cognizance of the case, and of compelling the corporation to comply? We have seen, that if they have no lands or other tangible property there, these courts cannot compel an appearance. Such contracts, therefore, under the laws of these states, where the contracts are supposed to have been made, are not reciprocal, and if not, they are not obligatory. No contract is valid at common law, that is not reciprocally binding upon the parties, or, where each party is not exposed to the process of the law in case of non-compliance. Contracts so unequal in their legal effects cannot be sustained on general principles. What is gained in Alabama, or Virginia, by rendering an executory contract with a foreign corporation valid? If such corporation has a right to contract for cotton or tobacco, if it is authorised in the state where it is created, it has an equal right to deal in bills of exchange, in gold and silver bullion, and in discounting notes. And this is the whole extent of the powers vested in the United States bank by its charter. With these unlimited powers in foreign corporations, would not the trade, commerce, credit, and business generally, of states opposed to banking and corporations be given over into the safe keeping of others, less scrupulous in granting charters ? If such is the law, these states may agree to sell, and be compelled in their own courts to execute their agreements, while, as to their own laws and courts, compliance will be wholly optional on the other side. Where contracts are executed and the money paid on the delivery of the commodity sold, these questions do not occur, and courts in such cases, cannot be called upon to enforce compliance. This is scope enough, and all that can be mutually beneficial, or mutually obligatory. Without a legal party as plaintiff, in whom the legal interest is vested, no action can be sustained. The purchaser of a note in Alabama, by an agent of a bank situated in Pennsylvania, and an indorsement thereon by the payee, would vest no legal interest in the bank there, so as to enable it to sue in its corporate name in the courts of Alabama. There would

be no legal plaintiff having the legal interest.

On the score of authority, the cases cited in the opinion under consideration, only establish the right of a foreign corporation to sue upon a legal contract. The cases in England go not one jot further. Nor do the cases referred to in the different states. The only case affecting the point in hand, is that of *The Bank of Marietta v. Purdell*, (2 Randolph Rep. 465,) and the decision there was, that the plaintiff could not recover. The learned chancellor approves the argument, but condemns the conclusion; admits the logic, but denies the result. The conclusion seems to me to be as inevitable as the reasoning is sound. Some ideal thing, existing in Ohio by mere intendment of their local laws, and deemed to be expedient in Ohio by legislative sanction, claimed an existence in Virginia — a standing in court, having no original or underived rights, but resting on the local laws of Ohio for its being and all its privileges. This invisible thing of the mind, claimed the right to deal in bills of exchange in Virginia by agent, and assumed "a local habitation and a name" upon the docket as plaintiff, against a citizen of Virginia. The court decided against the right, and defeated the action. It was against the policy of Virginia, said the judge, and that policy could not be regulated or affected by the laws of Ohio. It is against the policy of all the states by the rules of the common law, to deal in a corporate name without legislative authority. It is a fundamental error to say, that the right exists *until it is prohibited.* Until the right is created by the laws of any particular state, it need not be prohibited, for it does not exist. It is a *judicial* and not a legislature function, to deny the authority. The opinion of Judge Cabell, is, therefore, to be preferred to the criticism upon it.

This subject is likely to become a very important one. It cannot suffer from fair and impartial discussion. It will, no doubt, ultimately be settled by the supreme court of the United States. Whatever way it be decided, the question will be put to rest.

J. R.

Pennsylvania, September, 1838.

AMERICAN CASES.

UNITED STATES CIRCUIT COURT.

BOSTON, MAY TERM, 1838.

The United States v. James Wilder.

In proper cases of general average, the master and owners have a right to retain all goods of the shippers until their share of the contribution towards the average is either paid or secured.

It seems, that there is no exception to the general rule in favor of the United States or any other government or sovereignty, although there may be cases of contract where liens on the property of government do not attach, as on that of private persons.

Where certain slop clothing belonging to the United States was shipped on board a vessel which went ashore, and much expense was incurred in saving the goods on board, it was held, that the officers of the United States' government had no right to take the goods shipped by them, without paying or securing their contribution to the general average.

It seems, that in cases of salvage of private ships and cargoes, the freight on board belonging to government, is equally subject to the admiralty process *in rem*, for the proportion due for salvage, with that of mere private shippers.

The lien of seamen's wages and of bottomry bonds exists in all cases as much against government becoming proprietors, by way of purchase, or forfeiture, or otherwise, as it does against the particular things in the possession of private persons.

Sovereignty does not necessarily imply an exemption of its property from the process and jurisdiction of the courts of justice; and it seems a fair inference from the duties of the sovereign, in such cases, that where a lien exists on property, upon general principles of justice, *jure gentium*, that lien ought to be presumed to be admitted and protected by every sovereign, until the presumption is repelled by some positive edict to the contrary.

TROVER for certain slop clothing. — The parties agreed to the following statement of facts.

In this case it is agreed, that the schooner Jasper, from Boston to New York, went ashore on Block Island. Much expense was incurred in saving the goods, which is to be averaged by way of general average. Among the property on board, there were about one hundred bales of slop clothing belonging to the United States, invoiced at $7320. The goods being brought back to Boston the owners of the vessel make out an average bond for the freighters to sign. The store-keeper of the United States, (by whom the clothing was shipped) declines signing the bond;

claiming for the United States the right to take the goods without paying or securing their contribution to the average. This right being denied by the owners of the vessel, they refuse to deliver the clothing to the United States, and this action is brought to recover the value of the clothing.

It is agreed, that if the court are of opinion that the United States have no such right, judgment shall be entered for the defendant, and if the court are of opinion that the Un i-ted States have such right, the defendant shall be defaulted, and the clothing immediately given up.

The cause was argued upon the foregoing facts by *Mills*, District Attorney, for the United States, and by *Parsons* for the defendant.

Story J.—The sole question, in the present case, is, whether there exists a right of lien for the general average due on the goods (slop clothing) belonging to the United States, under the circumstances stated by the parties. There is no dispute that there has been a general average in this case, towards which all the goods on board, and among others the slop clothing of the United States, are to contribute.—There is as little doubt, that, for such general average there does exist, on the part of the master and owners of the schooner Jasper, a right of lien against all the goods belonging to all the other shippers, except the United States. In other words, that the master and owners of the schooner have a right to retain all the goods of such shippers until their proper share of contribution towards the general average is either paid or satisfactorily secured to be paid. That is sufficiently apparent from what is laid down in Abbott on Shipping, p. 3. ch. 8. s. 17. p. 361, 362, and in *Simonds v. White*, (2 Barn and Cress. 805, 811.) *Scaife v. Tobin*, (3 Barn. and Adolph. 523, 528, 529.) *The Hoffnung*, (6 Rob. R. 383, 384.) 2 Brown Adm. Law, 201, and Stevens on Average 50 —as the universal maritime law.[1]

The question, then, is, whether a like lien exists in regard to goods belonging to the United States. No case has been cited, in which any exception has ever been made in regard to the United States; nor has any authority been produced to show, that it constitutes a known prerogative of any other government or sovereignty. I have examined the treatises upon the prerogatives of the crown of England, and I do not find there, or in any of the great abridgments of the law under the title prerogative any such exception recognized, or even alluded to. The argument rests the objection upon the ground of public inconvenience if it should be held, that whenever a lien exists against a private person, it is to be held that the like lien attaches against the United States. And it is said, that in cases of contract for labor and services, or repairs, or supplies with the United States, no lien can be presumed to exist; but that the only remedy is an appeal, not to law, but to the justice of the government.

There may, for aught I know, be a just foundation for a distinction, as to liens, between the case of the government and that of a mere private person in many cases of contract. It may, perhaps, be justly inferred in many cases from the nature of certain contracts, and employments, and services for the government, that no lien attaches thereto. Thus, for example, it may be true, that no lien exists for repairs of a public ship, or for materials furnished therefor, or for wages due to the crew thereof, or for work and labor performed upon the arms, artillery, camp equipage, and other warlike equipments of the government.—In such cases the nature and use of the articles as the means of military and naval operations may repel any notion of any lien whatever, grounded upon the obvious intention of the parties. Many other cases of a like nature might be stated, in which the inference against a lien might be equally cogent. Some of them are alluded to in the opinion of the late lamented judge of the District Court of Maryland, (Judge Winchester,) in the case of the *United States v. Barney*, (3 Hall's Law Jour. 128, 129.) However, upon cases of this sort I desire to be understood as not expressing, because it is unnecessary in the present case, any absolute opinion.

But, that in all cases of contract made by the United States a like exemption exists from the ordinary lien attached thereto by the maritime law, is more than I know, or am prepared to admit. On the contrary, it seems to me, that the nature of the contract itself may sometimes furnish a suitable foundation on which to rest the presumption of a lien.

[1] See also Pothier on Maritime Contracts, by Cushing, p. 76, n. 134.

Take the case of a shipment of goods, like the present, by the United States, on board of a coasting vessel for transportation from one port to another, under the terms of the common bill of lading, by which the goods are deliverable to the consignee or his assigns, he or they paying freight; I must say, that I am not prepared to declare, that the ordinary lien for freight does not attach in such a case upon the very footing of the terms of the contract, in the same manner as it would upon a shipment by a private person.

But on this also I give no opinion; for it is not the case in judgment. The present case is not one arising under contract; but by operation of law, and, if I may so say, *in invitum*. It is a case of general average, where, as in a case of salvage, the right of the party arises from sacrifices made for the common benefit, or labor and services performed for the common safety. Under such circumstances the general maritime law enforces a contribution, independent of any notion of contract, upon the ground of justice and equity according to the maxim, *qui sentit commodum, sentire debet et onus*. And it gives a lien *in rem* for the contribution, not as the only remedy, but as, in many cases, the best remedy, and in some cases the only remedy—as, for example, where the owner of the goods is unknown. Indeed, it may be asserted with entire confidence, that, in a great variety of cases, without such a lien, the ship owner would be without any adequate redress, and would encounter most perilous responsibility. The case of *Scaife v. Tobin*, (3 Barn. and Adolph. 523,) already cited, has sufficiently established this; for in that case it was held, that against a consignee of goods, not being the owner, no remedy for contribution *in personam* would lie, notwithstanding his receipt of the goods; and that against him the only remedy was the detention of the goods for the contribution, unless upon a special contract.

It is said, that in cases where the United States are a party, no remedy by suit lies against them for the contribution; and hence the conclusion is deduced, that there can be no remedy *in rem*. Now, I confess, that I should reason altogether from the same premises to the opposite conclusion. The very circumstance, that no suit would lie against the United States in its sovereign capacity would seem to furnish the strongest ground, why the remedy *in rem* should be held to exist. And I do not well see, how otherwise it would be practicable at all, or if practicable, how, without extreme peril to the ship-owner, any private ascertainment or settlement of the general average could be made at all. The United States would not be bound by any such ascertainment or settlement of the average. They might deny the correctness of the valuation and apportionment; there would be no remedy to compel a submission to the authority of any tribunal of justice; and whether the ship-owner should ever receive any compensation or not, and what compensation, would depend upon the good will of congress after, what is a most lamentable defect in the existing state of things, a protracted appeal, and after many years duration of unsuccessful and urgent solicitations to that body. And yet the contribution of every other shipper may be, and indeed must be materially dependent upon what is properly due and payable by the United States. In the case of mere private shipments a court of equity (and probably a court of admiralty also by a proceeding *in rem*) would have ample jurisdiction to compel a reluctant shipper to submit to its jurisdiction, in ascertaining and decreeing an apportionment of the contribution to be made by all the shippers.

I cannot, therefore, but think, that the circumstance, that the United States, can in no other way be compelled to make a just contribution of its share in the general average, so far from constituting a ground to displace the lien created by the maritime law, does in fact furnish a strong reason for enforcing it. For I know no reason, why this court should create by its own mere authority an exemption, no where found recognized in the maritime law, and standing upon no very clear or urgent ground of public policy. To me, it is no small objection to such an exemption, that there is an entire silence on the subject, pervading all judicial treatises concerning the rights of sovereignty, and the lien created by the maritime law. Nor do I perceive any real convenience in asserting the lien. It is certainly competent for the treasury department, or other department of the government, to discharge debts of this sort, as well as others growing due by the United States; and if necessary to author-

ize any subordinate public officer to give due security for the payment, when ascertained, or to deposit a suitable pledge for it. The argument, therefore, addressed to this court, on behalf of the government, *ab inconvenienti*, does not seem to have any very solid foundation. On the other hand, the argument *ab inconvenienti* on the other side is very cogent and persuasive; for it is beyond doubt, that if there be no lien, there is no remedy to enforce an incontrovertible right.

I confess myself wholly unable to distinguish this case from one of salvage; and yet it has never been doubted, as far as I know, that in cases of salvage of private ships and cargoes, the freight on board, belonging to the government, is equally subject to the admiralty process *in rem*, for its proportion due for salvage, with that of mere private shippers. It may, for aught I know, be different in cases of the salvage of public ships. The same reasoning, however, which has been applied by the government against the lien for general average, applies with equal force against the lien for salvage of government property under all circumstances. Besides, it is by no means true, that liens existing on particular things are displaced by the government becoming, or succeeding to the proprietary interest. The lien of seamen's wages and of bottomry bonds exists in all cases as much against the government becoming proprietors by way of purchase, or forfeiture, or otherwise, as it does against the particular things in the possession of a private person.[1]

I have remarked, that it may be true, that no lien exists for salvage services to public ships of our own government. It seems, that in the case of *The Comus*, cited in 2 Dodson, R. 464, the high court of admiralty of England declined to entertain a suit for salvage of a British ship of war. What the particular ground of that decision was, is unknown; for the case is not reported. In respect to salvage services to a public ship of war of a foreign sovereign, no decision adverse to the right of salvage has been made, though the question was directly before the court in the case of *The Prins Frederik*, (2 Dods. R. 451,) and underwent a very learned discussion. That case never came to a final decision, the foreign sovereign having submitted to pay such compensation as Sir William Scott should award, and he accordingly awarded to the salvors 800*l*. A distinction was taken in that case—which, indeed, has been often taken by writers on public law, as to the exemption of certain things from all private claims; as, for example, things devoted to sacred, religious and public purposes; things *extra commercium et quorum non est commercium*. That distinction might well apply to property like public ships of war, held by the sovereign *jure coronæ*—and not be applicable to the common property of the sovereign, of a commercial character, or engaged in the common business of commerce. The case of *The Alexander*, (2 Dodson, R. 37,) may be supposed to have turned upon some distinction of this sort; but in reality it turned upon very different considerations. In that case, a British ship having on board a neutral cargo, and among other things a monument, belonging to the king of Prussia, intended to be erected to the memory of his late queen, was captured by an American ship of war and was afterwards recaptured by a British privateer. Salvage was decreed to the recaptors for the ship; but was denied as to the cargo, being neutral; and the expenses were decreed not to be a charge on the property of the king of Prussia. It is plain, that as the neutral cargo was in no danger of condemnation, the recaptors were entitled to no salvage on that, upon the well known doctrine recognized in the British and American courts, that the recapture of neutral property confers no real benefit in ordinary cases, and therefore there is no foundation for any claim of salvage.[1] The American prize courts, equally with the British, must have restored the monument belonging to the king of Prussia; for, though Prussia was an ally of Great Britian in her continental wars, she was neutral in the war with us.

In the case of *The Schooner Exchange*, (7 Cranch. 116,) it was considered, by the court, that the ground of exemption of the ships of war of a foreign sovereign, coming into our ports, from all process, was founded upon the implied assent of our government. But it was not decided, that the other property of a foreign sovereign, not belonging to his military or naval establishment, was entitled to a similar exemption. Bynkershoeck seems, in-

[1] See also the Copenhagen, 1 Robin. R. 289.

[1] See Talbot v. Seeman, 1 Cranch, 1. 28, 31, 37. The War Onskan, 2 Rob. R. 299.

deed, in his bold and uncompromising manner to have held all the property of a foreign sovereign, including his ships of war, to be liable in the courts of another sovereign, where they are found to be attached for his debts. His own government, however, in a case of that sort, released the property.[1] Bynkershoeck has the support of other jurists in favor of his opinion, at least to the extent of their common private property, found in the foreign territory.[2] But it is not necessary to consider this point further, as there may be a clear distinction between the case of a foreign sovereign and that of a domestic sovereign in this particular.

It has been laid down by Vattel, (b. 2. s. 213,) that the promises, the conventions, and all the private obligations of the sovereign, are naturally subject to the same rules as those of private persons. And this, as a general rule, has been adopted in the interpretation of contracts, to which our government is a party, by the Supreme Court of the United States, in the case of the *United States v. Barker*, (12 Wheaton's R. 559.) Vattel has added in the same place; "If there exists any difficulty on this account, it is equally conformable to prudence, to the delicacy of sentiment, what ought to be particularly conspicuous in a sovereign, and to the love of justice, to cause them to be decided by the tribunals of the state. This is the practice of the states, that are civilized and governed by laws."—(Vattel b. 2. s. 213.)[3] I fear that this republic cannot justly claim the praise of carrying into effect this deep and solid principle of justice. The United States are not sueable even in their own courts of justice; and the several States of the Union, with very few exceptions, have insisted on the same immunity. But I do not rely upon the language of Vattel to show, that it is the duty of the sovereign to fulfil all his obligations; whether founded in contract, or implied by the general principles of law; and that sovereignty does not necessarily imply an exemption of its property from the process and jurisdiction of courts of justice. And it seems to me a fair inference from the duties of the sovereign, in such cases, that where a lien exists on property, upon general principles of justice, *jure gentium*, that lien ought to be presumed to be admitted and protected by every sovereign, until the presumption is repelled by some positive edict to the contrary. None such exists in our country.

It was remarked by Sir William Scott in the case of *The Waterloo*, (2 Dodson's R. 433, 435,) where an exemption from salvage was set up by the East India Company on account of the salvor ship and the salved ship, being both at the time in its own service, that the exemption was "claimed from a right, otherwise universally allowed, and highly favored in law, for the protection of those, who are subjected to it; for it is for their benefit that it exists under that favor of the law. It is what the law calls *jus liquidissimum*, the clearest general right, that they who have saved life and property at sea, should be rewarded for such salutary exertions; and those, who say, that they are not bound to reward, ought to prove their exemption in very definite terms, and by arguments of irresistible cogency." The same considerations apply, with the same force, to the claim for general average. And I cannot but think, that public policy will be promoted and not impunged, by holding, that the remedy for the reward is not uncertain or precarious, but attaches as a lien, primarily *in rem*, and does not await the slow, or tardy, or distant justice of the government in awarding it. If there ever was a case which ought to be settled by a court of justice, upon principles of right and liberality, this is precisely that case. No court of justice ought to decline to enforce it, unless there be some clear, definite and incontrovertible prohibition against the exercise of it.

Finding, therefore, no such exemption from the ordinary lien for general average, as the government seeks to sustain, justified by any general principle or any authority, I am not bold enough to create one. The consequence is, in my opinion, that the present suit is not maintainable, and that judgment ought to be entered for the defendant.

My learned brother, the District Judge, concurs in this opinion, and therefore let judgment be entered accordingly.

[1] See Bynk. De foro Legatorum, ch. 3, 4. See also S. P. cited 7 Cranch, 125, 126, and The Prins Fredrik, 2 Dods. R. 458 to 462.

[2] Martens on Law of Nations, B 5, s. 9.

SUPREME JUDICIAL COURT.

CASTINE, ME., JUNE TERM, 1838.

Winslow Hinks, Jr. v. Ebenezer French.

The payee of a promissory note is a competent witness in an action between the maker and endorsee, to prove facts in relation to the note which transpired after the making.

THIS was an action of assumpsit upon a note of hand, made by the defendant, and payable to one Elbridge G. Boothby, or order, for the sum of $982 26. The action was brought by the plaintiff as endorsee. The execution of the note was proved or admitted, and also the signature of the said Boothby as endorser, at the trial, June term, 1837, *Emery J.* presiding.

The defendant offered the deposition of Boothby for the purpose of proving, that the plaintiff had no legal interest in the action, and that the note was endorsed to him for the purpose of having the action brought in this county and of giving this court jurisdiction of the same, the said French, the maker, and the said Boothby, the endorser, of said note, being, at the commencement of this action, citizens of Bangor, in the county of Penobscot, and there resident. This deposition also went to show, that the said Boothby was the *bona fide* owner of the note, and had obtained the written permission of the plaintiff to bring the action in this manner for the purpose of procuring judgment at an earlier day than it could be obtained in the county of Penobscot. The plaintiff objected to the admission of the deposition, and the judge sustained the objection; whereupon the defendant consented to be defaulted with leave to move the whole court to take off the default and grant a new trial, if they should be of opinion, that the deposition ought not to have been rejected. The action was continued on the report of the judge.

At the present term of the court, *W. Abbott*, in support of the motion for a new trial, contended, that, in an action against the maker of a note, the endorser was a competent witness to prove the note paid. 2 Starkie on Evidence, 301. The only objection which could now be made against the testimony of a party to a note was his interest. Bailey on Bills, 371. So it was now fully established, that a person who had signed a negotiable note might defeat it by his testimony. *Ibid.* A drawer of a bill dated abroad might show, that it was made in England and, therefore, not admissible in evidence, not being stamped. *Ibid. Jordaine v. Lashbrooke*, (7 Term Rep. 601.) *Barker v. Prentiss*, (6 Mass. Rep. 430.) In the case at bar, the money, if recovered by the plaintiff would be held in trust for the endorser and the witness. He swears, therefore, against his interest, for if this action was defeated, he would be liable to pay the cost, and, at the same time, be liable to the plaintiff as endorser.

This case was attended by fraud and oppression; fraud by implication of the law, being intended to nullify the statute regulating the jurisdiction of our courts, and oppression by subjecting the maker to additional costs.

Bradford et al. v. Bucknam, (3 Fairfield, 16,) and *Fisher v. Bradford*, (7 Greenleaf, 28,) were cited to show this, and that a plaintiff, in order to maintain his action, should prove a legal interest in the note. He also cited *Parker v. Hanson*, (7 Mass. Rep. 470,) to the point, that the payee of a negotiable note is a competent witness to prove an alteration of the note after its execution; and *Skilding et al. v. Warren* (15 Johnson's Rep. 270,) and *Woodhull v. Holmes*, (10 Johnson's Rep. 231,) shewing that a party to a negotiable instrument is inadmissible to show it void at the time of its execution, but competent to testify as to facts *subsequently* arising, which go to defeat the recovery of the holder, or to destroy his title. Starkie on Evidence, part iv, note 3, and cases there cited. In an action on a promissory note, a witness who is the real plaintiff in interest may be called and examined by the defendant. *Connor v. Brady*, (Anthon's Nisi Prius, 99.)

J. A. Poor, for the plaintiff, cited *Matthews v. Houghton*, (1 Fairfield, 420,) and cases there cited; he also commented on *Fisher v. Bradford*, cited by the defendant, and contended, that in the present case, there was no fraud or oppression. The defendant ought not to complain, as it was not contended that he had not paid his note.

Shepley J. The deposition should have been admitted at the trial, and the court are of opinion that the default must be taken off and a new trial granted.

Note.—The court were understood, by the reporter of this case, and other gentlemen present, to say, that the action could be maintained under the circumstances set forth in the deposition;—that the plaintiff stood in the situation of a trustee for the owner of the note, and that his consent being obtained before judgment, was sufficient to sustain the action. The counsel for the defendant, however, who was not in court when the opinion was delivered, intends to avail himself of the privilege of a new trial, at the next term, and bring the question distinctly before the court for their decision.

SUPREME JUDICIAL COURT.

SALEM, MASS., NOVEMBER TERM, 1837.

The Commonwealth v. Benjamin Kimball.

The statute of 1837, chap. 242, prohibiting any person from selling wine, brandy, rum, or other spirituous liquors by retail without licence, is not repugnant to the laws and constitution of the United States.

The statute, neither in its terms, nor its operation, professes to prohibit the sale of imported spirits, by the importer, either by wholesale or retail.

Where there is a conflict, in any particular, between the law of a state and the laws or constitution of the United States, to that extent and no further, the former is rendered, by such conflict, inoperative and void.

THE defendant in this case was tried and convicted at the last term of the court of common pleas, for retailing spiritous liquors in less quantities than twentyeight gallons. Exceptions were taken to the opinion of the judge, who presided at the trial, which were argued at the present term of this court, by *Austin*, attorney general, for the Commonwealth, and by *Rantoul*, for the defendant.

The facts in the case sufficiently appear in the opinion of the court, which was delivered by

Shaw, C. J.—The only exception taken to this conviction, and to the instructions of the judge in point of law is, that the law of this commonwealth prohibiting any person from selling wine, brandy, rum, or other spirituous liquors by retail without license, is repugnant to the laws and constitution of the United States, and consequently inoperative and void.

It has already been remarked in another of this class of cases, argued at the present term, that in considering the constitution and laws of the United States, and those of the several states, and deciding whether their respective provisions do come in conflict or not, and to what extent, it is proper and absolutely necessary to have a just regard to the laws and institutions of the country, and of the respective states, as they existed before the formation and adoption of the constitution of the United States, and to the objects and purposes had in view by that constitution. The great and leading object of this complex system of government was to select a few great and important subjects of administration, in which all of the states, and the people of all the states have a common interest, to confide them to the general government, with all the collateral, incidental and implied powers, proper and requisite to enable that government to conduct and administer them, in all their details, and to organize a system with all the executive, legislative, and judicial powers and functions necessary to the full and entire performance of all the duties of such a government. All other powers of sovereign government, necessary or proper, to provide for the peace, safety, health, morals, and general welfare of the community, remain entire and uncontrolled, to the state governments; and in the exercise of them they have the right and power to resort to all adequate and appropriate means, for carrying these powers into effect, unless they shall happen, in any particular instance, to come directly in conflict with the operation of some law of the United States made in pursuance of its enumerated powers. In the latter case, inasmuch as it is declared and admitted, that the constitution of the United States, and all laws and treaties made in pursuance of its just powers, shall be the supreme law of the land, it follows as a necessary consequence, that, to the extent of such collision and repugnancy, the law of the state must yield; and to that extent, and no further, it is rendered, by such repugnancy, inoperative and void.

It is contended, that the law in question prohibiting the sale of brandy, rum and other spirits, by any person within this Commonwealth, without being duly licensed, is contrary to that provision in the constitution of the United States, which prohibits the several states from levying any duty or impost, upon imports or exports, except such as may

be absolutely necessary to enforce and carry into effect their respective inspection laws; and also, that it is repugnant to that clause which confides to the general government the power to regulate commerce with foreign powers, and amongst the several states.

The power to regulate licensed houses, and to provide for the regulation of the sale of spirituous liquors, in such manner as to guard against abuses, and to prevent the evils of disorderly houses, breaches of the peace, riot, immorality and pauperism, is an acknowledged power of the state government; it had long been in active operation, in this state, and no doubt in other states, before the constitution of the United States was adopted. It is not to be presumed, that the constitution was intended to inhibit or restrain the exercise of so useful and necessary a power, unless it shall so appear by plain words or necessary implication. The burden is upon those who would set up and enforce the restraint, to establish it, by showing that the constitution, by particular provisions, or in the accomplishment of its general purposes, necessarily interferes with it. The power to direct and regulate the mode of selling, by citizens of the state and within its own territories, is one of the acknowledged powers of state government, which never has been, and never can be questioned. It is in virtue of this power, that all laws respecting hawkers and pedlers, auctioneers, and others, are made. This consideration affords a view decisive of the present case. The law in question, neither in its terms, nor its operation, professes to prohibit the sale of imported spirits, by the importer, either by wholesale or by retail, nor do these laws propose to raise a revenue upon the licenses granted. But it is argued for the defendant, that the prohibition to sell is general, and makes no distinction between the cases of a sale by the importer of imported spirits in the original packages, supposing them under twentyeight gallons, and the sale of spirits not imported, or not by the importer, or not in the original packages. Be it so, what is the consequence? Supposing the the law could be construed to be repugnant to the constitution of the United States, in so far as it prohibits the sale of imported spirits, by the importer in the original package, it would be void thus far and no further, and in all other respects, conforming to the acknowledged powers of the state government, it would be in full force. Whether legal enactments, some of which it is competent for the legislature to make, and others not, are contained in the same or different sections of a statute, can make no difference. It is not the defect of form, but of power, that invalidates any of them; it is, therefore, the subject matter, and not the arrangement of the language, in which it is embodied, that is to be regarded, in deciding whether any provision is constitutional or not. If, therefore, the defendant had offered to show in his defence, that the spirits charged to have been illegally sold by him, without license, contrary to the statute, were imported by himself, and sold in the original package, it would then have given rise to the question which has been mainly argued in the present case. But no such evidence was offered, nor has it been intimated, that such was the fact; on the contrary, it is, as far as appears by the report, the ordinary case of the sale of spirits at retail, either domestic distilled spirits, or foreign spirits which had been sold by the importer, and become mixed up with the general mass of that class of merchandise offered for sale in small quantities by the retailer.

But under the circumstances in which the case has been brought before the court, we think it proper to place this decision upon broader grounds. We are of opinion, that these laws fall clearly within that large class of powers necessary to the regulation of the police, morals, health, internal commerce, and general prosperity of the community, which are fully subject to state regulation; and that the objects to be accomplished by them are to be reached and effected by any appropriate means which do not interfere with the exercise of any of the powers vested in the general government. These various objects are alluded to, and partially enumerated by Mr Chief Justice Marshall in delivering the opinion of the court in the leading case of *Gibbons v. Ogden*, (9 Wheaton, 1.) He is speaking of that immense mass of legislation which embraces everything within the territory of a state, not surrendered to the general government, all which can be most advantageously exercised by the states themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the

internal commerce of a state, are component parts of this mass.

The proposition upon which the court rests this decision is this, that to promote the peace, order, and security of the community; to prevent the evils of vice, riot, pauperism, and the temptation to crime, by securing and enforcing due regulations for the control and superintendence of the houses and places where spirituous liquors are to be sold is an important object of internal police; that it was before the adoption of the constitution, and still is, within the jurisdiction of the state government, never having been confided to the general government, and that the laws of Massachusetts, on which this indictment is founded, do not, by any of the means adopted to accomplish this useful and legitimate end, interfere with the laws of the United States.

The case mainly relied on by the counsel for the defendant is that of *Brown v. The State of Maryland*, (12 Wheaton, 419.) That case turned upon the effect of a law of the State of Maryland, prohibiting every importer of foreign goods from selling the same, by wholesale, bale, or package, without first taking out a license and paying fifty dollars therefor. It was held, that this law was directly repugnant to that clause in the constitution which prohibits the states from laying a duty on imports, it being held that taxing a license on the sale *by the importer*, was equivalent to a tax on the goods imported, or on imports.—It was obviously an act for raising a revenue, and in accomplishing that purpose was directly repugnant to that clause in the constitution already cited, and also to the provision vesting in the general government, the exclusive power to regulate commerce. But the principles adopted by the majority of the court in that case, are such as clearly to exclude the present. It had been strongly pressed in argument in that case, that if the right to import gave the importer a right to sell, which could not be controlled by a state law, such right was absolute and unconditional, and gave him a right to sell in any manner, as at auction, or by retail, or as a hawker and pedler; also to sell in any place and in any manner he pleases, and this in regard to any species of commodities however dangerous to life or health, as gunpowder, or infected goods, and so would prohibit the states from making such laws as the health and safety of her citizens might require. This argument is distinctly repelled by the court, who hold, that the privilege attaches to the importer, only whilst he holds the goods in the original packages, and as importer; and when he has once mixed them with the general property of the community by breaking up his packages, his privilege of importer has ceased, and the property, thus mixed with the general mass, is liable to state regulation. So of gunpowder, say the court, the power to direct its removal, is a branch of the police power which unquestionably remains and ought to remain with the states. The case proceeded wholly on the ground, that the law was repugnant to the constitution and law of the United States by imposing a duty on the wholesale dealer, be he importer or otherwise, selling in the original package, before the goods were opened, and exposed for sale, by retail, to the consumer; and that, when so opened and exposed to sale, and mixed up with the general mass of saleable commodities, they were subject to state regulation, so far as the police laws, and general laws of the state intended to promote the peace of the state, and the welfare of its citizens, applied to such commodities, in common with all others of like kind.

The power to pass laws for regulating licensed houses as one of the powers of general police, is clearly vested in the state, and is as clearly not vested in the general government. But in carrying into effect a law, flowing from one of the acknowledged powers of the state, they may resort to means, which, in their operation, would oppose impede a law of the United States, made pursuance of its acknowledged powers. In such case the law of the state must yield, so far as it can have this effect. But as already stated, such conflict is not to be presumed, but on the contrary it must be clearly shown and established. In the present case, it is not shown, nor can we presume that the law regulating the sale of spirituous liquors by retail, and confirming the power to sell in that form to those who shall first have obtained the recommendation of the proper officers to that employment will frustrate, defeat, or impede any law of the United States. Such law will afford some reasonable assurance to the community that the persons recommended and licensed are of good moral

character, of orderly and sober habits, and who will be likely to render such places of sale, as little injurious to the peace and good order of society as circumstances will admit.

The exception to the instruction of the judge of the court of common pleas, in this respect, is overruled.

SUPREME JUDICIAL COURT.

BANGOR, ME., JUNE TERM, 1836.

John Lane v. Seth Padleford.

An endorser of a negociable note is a competent witness to prove, that the note was endorsed after it became due: and that it was originally made for the purpose of obtaining a discount but that the maker failing to procure one put it into the hands of the endorser as collateral security for other and smaller notes.

Held, also, that such facts furnish a complete defence to an action on the note by an endorsee, he not being the holder of the principal notes.

THIS was an action of assumpsit on a joint and several promissory note of hand, signed by the defendant and Harry Padleford, for $150, dated February 26, 1834, payable to Solon Beale or order, in 60 days from its date, and by him endorsed to one E. F. Orff, and by said Orff endorsed in blank to the plaintiff. The defendant offered the deposition of Beale, the endorser, to prove the following facts, viz: that on or about the 7th of November, 1833, Harry Padleford gave said Beale his two notes for $20 and $30, respectively, for money borrowed. In February, 1834, he called on Padleford for payment, when the defendant and Harry Padleford made the note in suit, for $150, in order to raise the money on it and pay the two small notes therefrom. Failing to negotiate it, he put this $150 note into said Beale's hands as collateral security for the other notes. Beale held all the notes till about the middle of June, 1834, at which time he transferred the two small notes, and also the large note in the same way that he had received it, as collateral security, informing the person to whom the transfer was made of the facts respecting the notes. To the admission of this deposition the plaintiff objected. The parties having admitted, that the two small notes referred to in Beale's deposition, were not in the hands of the plaintiff, he knowing nothing of the agreement therein contained, the defendant suffered a default under the agreement, that if the deposition was admissible such judgment was to be rendered as the court might judge proper, otherwise the default to stand.

J. Appleton, for the plaintiff, contended, that the deposition was inadmissible as tending to show that the note was originally void, Beale, the endorser, not being a competent witness to prove that fact. That, if admissible, it would not have the effect to defeat the action, but that judgment ought still to be rendered for the amount of the small notes.

T. P. Chandler and *A. W. Paine* for the defendants.

Weston C. J.—The deposition of Solon Beale does not prove the note in suit to have been originally void; but that it was made with a view to be discounted to raise money for the use of one of the makers, a part of which was to be applied to pay a debt due to the deponent. The party did not succeed in that object, but left it with the witness as collateral security for his debt. To that amount it was his property; for the residue he held it in trust for the maker. It was not void. If negotiated before it was due notwithstanding these facts, it would have been good for its whole amount in the hands of a *bona fide* holder without notice of the trust.

In *Adams et al. v. Carver et al.* (6 Greenl. 390.), *Churchill v. Suter*, (4 Mass. 156.), was regarded as the leading case, in which it was decided, that a party to a negotiable instrument shall not be received as a witness to prove it to have been originally void. The court there say, "this is the extent and limit of the objection to testimony of this kind." In the same case, it was decided, that a party to a note may be received to prove, that it was negotiated after it became due; and we think Beale's testimony is admissible to prove, also, that after it was made, and after their failure to raise money upon it, he received it as collateral security. As such it was operative. The objection taken in this case was urged in *Van Shaack v. Stafford*, (12 Pick. 565,) and upon much stronger ground than here, yet the admission of a party as a witness there was held not inconsistent with the case of *Churchill v. Suter*.

When Beale transferred the principal debt

nearly two months after this note was due, he passed the note also, notifying the party to whom he passed it, that it attended the principal debt only as collateral security. It is now separated from the principal debt, and by the fraud of some subsequent holder, has passed to the plaintiff without notice of the purpose for which it was held, or the trust attending it. But being dishonored paper he must be understood to have taken it upon the credit of the party from whom he received it. In his hands it is subject to every defence which could have been set up by the maker if it had remained with Beale. *Tuckev v. Smith*, (4 Greenl. 415.)

The plantiff the holder has been deceived and fails to realize what he may have expected, and so he would have been, receiving the note after it was due, if the maker could prove matter of offset in defence or payment to a former holder. He must look to the party who negotiated it to him. Not being the holder of the principal debt to which this was collateral, he is not entitled to recover any part of the note of the maker. The default is accordingly taken off and a nonsuit is to be entered.

MUNICIPAL COURT.

BOSTON, JUNE TERM, 1835.

Before Thacher,—Judge, and a Jury.

The Commonwealth v. Ezekiel F. Lancaster.

The note of a minor is not *property* within the act of 1815, ch. 136.

Where by means of false pretences, a party had obtained from a minor his note, which at the time of the prosecution was not due nor paid;—it was held, that the offence of cheating by false pretences was not complete.

This indictment was founded on the act of 1815, ch. 156, and charged the defendant with having designedly and fraudulently obtained from one Isaac Miles, his negotiable note of hand for $281, by means of certain false pretences, and with the intention to defraud him of that amount. It appeared at the trial, that the said Isaac Miles bought of Lancaster a printing press and a lot of printing types, and gave for them in payment the note in question, which had not yet become due, and to secure payment of the note, he had executed to Lancaster a mortgage of the press and types, which were remaining in Lancaster's possession at the commencement of the prosecution. The false pretence alleged in the indictment was, that Lancaster had declared to Miles, that the press and types belonged to him, and were free from any charge or incumbrance. It was alleged, however, in the indictment, and proved at the trial by the testimony of one David H. Kane, who was sworn and examined as a witness, that in the month of September, 1834, he sold the whole printing establishment to Lancaster, taking in payment his two notes each for $700, and that, to secure the payment of these notes, Lancaster executed to him a mortgage of the press and types; and that the deed of mortgage was recorded in the office of the city clerk, according to the act of 1832, ch. 157. Kane further testified, that, during the negociation between Miles and Lancaster, which was in March 1835, the latter asked him to consent to his selling a portion of the articles, to which he agreed, provided that an amount of property equivalent in value, should be substituted in their place. But the witness said, that there was no removal of the property, and that he had heard nothing further of the negociation.

It appeared further, that, after Lancaster had obtained the note of Miles, he passed it to Messrs Hilliard, Gray and Co., as collateral security for a purchase of books, to the amount of $300 in value, which they had sold and delivered to him on credit.

At this stage of the trial, *S. D. Parker*, the attorney for the Commonwealth, suggested to the court, that owing to some accident, or misunderstanding, that the trial was not to come on at that time, Miles was not present. The judge proposed to postpone the further hearing. But as it had been stated by Mr Kane, in the course of his testimony, that Isaac Miles was a minor, a question arose as to the effect of that fact, which Mr Parker said could not be controverted. He further said, that if that fact was fatal to the prosecution, he was willing to submit the case to the jury under the direction of the court.

George Bond, Esq., the foreman of the jury, inquired of the court, whether that fact would alter the moral turpitude of the transaction on the part of the defendant; and whether it would be right to subject Miles to the necessity of resisting payment of the note by pleading his minority.

The defendant had no counsel.

Thacher, J. instructed the jury, that the charge against Lancaster, for which he was on trial, was for defrauding Miles of his property by false pretences. If no property had been obtained, however dishonest were his intentions, the crime was incomplete, and Miles was not defrauded. If Miles had paid the note, presuming that it was binding, he would have been defrauded of the amount paid. But it being admitted, that Miles, at the time he signed the note was a minor, it was not binding on him, and he could not be compelled to pay it. The law doth not consider an infant bound by any executory contract which is not for his advantage. He is able to contract for board, clothing, instruction and other necessaries according to his degree; because these are needful to him, and for his benefit. If Miles should hereafter choose to pay the note, having a full knowledge of the facts; it would be considered a voluntary payment on his part, and consequently not a ground to impute fraud to Lancaster. But as the note was made by a minor, and contained no binding obligation in law on him to pay it, and payment had not been made, it was not to be considered as *property*, of which he had been defrauded;—and therefore the jury were bound to find the defendant not guilty.

The jury accordingly found the defendant not guilty. But the court refused to order his discharge, until Messrs Hilliard, Gray and Co. had an opportunity to present a complaint against him, if they should see fit to do so. For which purpose, he was ordered to be brought into court on the 15th of June, to which the court was adjourned.

> ——Et incolumis lætor quid vivit in urbe:
> Sed tamen admiror quo pacto judicium illud
> Fugerit.

There was no doubt, that Lancaster had conducted in a fraudulent manner. His acquittal was unexpected both by himself and his friends.

Note.—The power of infants to contract obligations is similar both at the common and the civil law. Both respecting the same reason.

Lit. sect. 259. 171. (b). It is to be understood, that when it is said, that males or females be of full age, this shall be intended of the age of twentyone years; for if before such age any deed, or feoffment, grant, release, confirmation, obligation, or other writing, be made by any of them, &c. or if any within such age be bailiff or receiver to any man, &c. all serve for nothing, and may be avoided.

Co. Lit. 172. (a). By bailiff is understood a servant that hath administration and charge of lands, goods, and chattels, to make the best benefit for the owner, against whom an action of account doth lie for the profits which he hath raised or made, or might by his industry or care have reasonably raised or made, his reasonable charges and expenses deducted. But one under the age of twentyone years shall not be charged in any such account; because, by intendment of law, before his full age he hath not skill and ability to raise or make any such improvement and profit.

Inst. Dn. Just. l. 1. cap. 21. Auctoritas autem tutoris in quibusdam causis necessaria pupillis est, in quibusdam non est necessaria. Ut ecce si quid dari sibi stipulatur: non est necessaria tutoris auctoritas. Quod si aliis pupilli promittant, necessaria est. Namque placuit meliorem quidem suam condicionem licere eis facere, etiam sine tutoris auctoritate. Unde in his causis, ex quibus obligationes mutuæ nascuntur, ut in emptionibus, venditionibus, locationibus, conductionibus, mandatis, depositis: si tutoris auctoritas non interveniat; ipsi quidem qui cum his contrahunt, obligantur: at invicem pupilli non obligantur. Ed. Lugduni. M.D.XCIII.[1]

SUPREME JUDICIAL COURT.

WORCESTER, MASS., OCTOBER TERM, 1838.

Hayward, App., v. Hayward, Ad.

Choses in action, in which a wife is interested, will survive to her upon the death of the husband, unless reduced to possession during his life, whether they belonged to her at the time of marriage or were acquired during coverture.

The distributive share of an estate, which descends to a wife during coverture, will go to her on the death of the husband and not to his executor, if the same has not been reduced to possession by the husband.

S. H. died intestate leaving two sons, and

[1] See the opinion of Judge Thacher in the case of *Carrol v. Gooding*, Law Reporter, p. 75.

one daughter, then the wife of the defendant's intestate. Before the estate of S. H. was settled and a decree of distribution made, the husband died, leaving the appellant his widow. Upon the settlement of the estate of S. H., the distributive share of the daughter was decreed to be paid to the defendant, as administrator of the estate of the husband. From this decree the widow appealed.

The case was argued by *Hastings* for the appellant, and by *Washburn* for the defendant, at the October term, 1836, and now *Dewey J.*, delivered the opinion of the court.

The question in this case is, whether the distributive share of a wife in her father's estate, vests in the husband, during coverture, in such a manner as not to survive to her at his death.

The distributive share of an heir at law goes to his executors if he dies before distribution made, *Brown v. Shore*, (1 Show. 25.) *Wallis v. Hodson*, (2 Atk. 116.) and, as the interest of the heir in such cases vests immediately on the death of the intestate, the time of the death of the husband, whether before or after distribution, can make no difference in determining this question. The question recurs, did the interest of the wife as heir, so vest in the husband, that, without any act on his part, it would go to his executor? As a general rule, he acquires only an inchoate right to her choses in action, which can only become complete by reducing them to possession. Does this rule apply in regard to choses acquired during coverture?

We have been referred by the defendant's counsel to the American edition of Comyn's Digest, *Baron* and *Feme*, E. 3, as an authority, that choses in action, acquired during coverture, vest in the husband alone. And also to the cases *Palmer v. Trevor*, (1 Vern. 261,) and *Oglander v. Baston*, (ib. 396,) and Toller on Executors, 225. In the leading case in Vernon, the question of survivorship did not properly arise, and the authority from Toller is a case where the husband survived the wife. As authorities more directly bearing upon the question now before us, we refer to *Schuyler v. Hoyle*, (5 John. Chan. Rep. 196,) and *Blount v. Bestland*, (5 Vesey, 515.)

The case principally relied on by the defendant was that of *Griswold v. Penniman*, (2 Conn. Rep. 564.) That case rests very much upon a *dictum* of judge Reeves in his Domestic Relations, who cites no authority for his position, that a claim for a legacy does not survive to the wife. Another ground on which the case of *Griswold v. Penniman* is sustained, is, that the husband might sue alone to recover the distributive share that descends to his wife. But the inference drawn from that circumstance is not well founded, for there are cases where he might sue alone, as in the case of a bond given to him and his wife, and yet it is well settled, that such a chose would survive to her. The case of *McNeilage v. Holloway*, (1 B. and A. 218,) of a promissory note is in point. This, then, cannot be the test of what will survive, *Draper v. Jackson*, (16 Mass. R. 482.) although the rule as to joining husband and wife in actions has been differently applied, by different courts.

The following are some of the authorities which go to show, that choses in action, acquired during coverture, do survive to the wife. *Garforth v. Bradley*, (2 Vesey Sen. 676.) *Elliot v. Collier*, (1 Wils. 168.) *Wildman v. Wildman*, (9 Vesey, 174.) *Baker v. Hall*, (12 Vesey, 497.) *Richards v. Richards*, (2 B. and Ald. 447.) *Nash v. Nash*, (2 Mad. 133.) *Philliskirk v. Pluckwell*, (2 M. and S. 393.) per Dampier J. Clancy 4.1 Dane. Ab. 342, 344. *Galligo v. Galligo, Ex.* (2 Brock. 285. 2 Call. 447.) *Lodge v. Hamilton, Adr.* (2 Serg. and Rawl. 491,) and *Schuyler v. Hoyle*, (5 John. C. Rep. 196,) which is a leading case, and arose between the heirs at law and the executor of the testator.

If the question is open in this Commonwealth, the court think the doctrine sustained by the authorities cited, ought to be considered as law here; and that all rights of action acquired during coverture by devise, distribution, or gift, to the wife, should survive, unless reduced to possession by the husband.

This precise question has never been settled here. The cases cited by the defendant's counsel, which are supposed to conflict with this doctrine are *Shuttlesworth v. Noyes*, (8 M. R. 229.) *Clapp v. Stoughton*, (10 Pick. 463.) *Com'th v. Manly*, (12 Pick. 173.) *Goddard v. Johnson*, (14 Pick. 352,) and *Draper v. Jackson*, already mentioned. In the first of these, the question of survivor-

ship did not arise as both parties were alive, and the only question was, if a debtor who had given a note to the wife after marriage, should be held as trustee of the husband, and it was held, that he would be thus holden, and of the same opinion are the court now. In the case of the *Commonwealth v. Manly*, the note was given to the wife and described in the indictment as her sole property, so that the decision was correct, and there was no occasion to settle the question of survivorship.

In *Clapp v. Stoughton*, the question related to the rents of real estate during coverture, and a difference between the cases is, that there, the subject of the suit was the income of a principal belonging to the wife, here the principal itself is sought to be recovered.

In *Goddard v. Johnson*, there is no question, that the plaintiff was entitled to recover as survivor, the only doubt in regard to the case is, whether he ought not to have sued as administrator of his wife's estate. The case of *Jackson v. Draper*, has been considered, in some respects, overruled, and will not sustain the doctrine for which the defendant contends. The case of *Dean v. Richmond*, (5 Pick. 461,) was one of a divorce, and the question related to the effect of such a divorce upon the husband's right to a note given for the wife's land.

Upon a review of all the cases, the court are of opinion, that a chose in action, given to the wife during coverture, will survive to her if not reduced to possession by the husband during his life, in the same manner as if given to her before marriage, and that the appellant's distributive share in her father's estate, not having been received by her husband in his life-time, survived to her; in whose favor a decree is to be entered.

Philps, Executor, v. Philps.

A note given to a wife during coverture will survive to her if taken with the assent of the husband, unless reduced to possession in his life-time.

Thus, where a wife held a note at the time of her intermarriage upon which interest was paid to her during coverture, and she loaned the amount so received, taking a note to herself, and this was done with the consent of the husband, it was held, that upon the death of the husband, such note belonged to his widow and not to his executor.

Such consent of the husband cannot be counteracted by any expression in his last will and testament.

Whether a mere act of a widow indicating her election of the provisions of her husband's will is binding, as an election, if done with an ignorance of her legal rights, *quære*.

The plaintiff was executor of Asor Philps, husband of the defendant. On the marriage of the testator with the defendant, in 1815, she held a note of hand against A. B., upon which the interest and parts of the principal were paid from time to time. The testator suffered her to retain the note and receive the interest, and declared, that he did not intend to claim the ownership thereof, and she accordingly took notes to herself for such sums as she loaned from time to time. By the will of the testator he gave certain legacies and devises to his wife, but made it a condition, that she should not claim any of the property which she had been in the habit of calling her own.

Within a few months before the decease of the testator, the defendant loaned to one H. a sum of money, which had been received by her as interest, and took his note running to herself, and held it at the time of the testator's decease. After that time, she received the money due on the last mentioned note and refused to deliver the same to the plaintiff. The present action was assumpsit to recover the money so received by the defendant. The plaintiff contended, that the money was received to his use, and, moreover, that the defendant had elected to accept the provisions of the will, and thereby waived her supposed right to retain the money. The evidence on this point was, that she had continued to occupy the real estate, the use of which was devised to her, more than 40 days after her husband's death, and had permitted a stranger to occupy a part of it several months.

Washburn for the plaintiff.

Merrick for the defendant.

Dewey J. delivered the opinion of the court.

After reciting the facts, he stated the case to be, that the executor claimed to recover the amount of a note given to the defendant for interest arising on a note given to her before marriage. The court were of opinion, that he could not recover. The authorities upon which this opinion was sustained were *Draper v. Jackson*, (16 Mass. R, 480,) and

Stanwood v. Stanwood, (17 Mass. R. 57,) besides the authorities cited by the court, and the principles adopted by them, in the case of *Hayward v. Hayward*, decided at the present term.

In the present case the declarations by the testator were as strong as those used by the husband in *Stanwood v. Stanwood*, relative to his intention that the wife should be the owner of the property sought to be recovered, and any declaration in his will counteracting his former consent would be unavailing.

But the plaintiff contended, that the defendant had waived her right to hold this money by accepting the provisions of the will, and there was evidence tending to show such an election on her part. But the court were of opinion, that the acts done by her, were done with an ignorance of her rights, and, consequently, did not afford conclusive evidence of her having made her election in favor of the provisions of the will.

This opinion was strengthened by the provisions of the Revised Code giving a widow the right to occupy the mansion house of her husband for a limited period after his death.

From this opinion *Morton J.* dissented.

He could not doubt, that the receiving of the money by the wife was a reducing of it to the husband's possession. She must have acted in so doing as the agent of her husband, and her subsequently loaning the amount was a loan of her husband's money, and did not change the property in the debt thereby created.

Wheeler v. Bowen and Trustee.

An administrator is liable to the process of foreign attachment at the suit of a creditor of a distributee of the intestate's estate, although the amount to which such distributee is entitled cannot be ascertained at the time the trustee is served with such process.

The distributive share of a wife in her father's estate is liable to be taken by a creditor of her husband, by process of foreign attachment against him, although he may not have reduced such share of his wife to possession.

Where a person, summoned as a trustee under process of foreign attachment, discloses that he has effects in his hands, the amount of which cannot be ascertained at the time of making his answer, the court may continue the action for the purpose of enabling him to ascertain and disclose such amount upon further answer, or such trustee may answer further upon *scire facias*.

This was a question as to charging the trustee, by whose answer it appeared, that he was administrator of the estate of A. B., the father of the defendant's wife, and as such, held in his hands estate, to some portion of which she would be entitled as distributee; but the estate being unsettled, and the debts due not being ascertained, it was uncertain how much her share would be, nor could the same be ascertained till the estate should be settled in the probate office.

Allen, for the trustee, contended, that this was a contingent claim which could not be the subject of a trustee process.

Washburn for the plaintiff.

The opinion of the court was delivered by *Dewey J.*

The question here is, can an administrator be charged as the trustee of a distributee of an unsettled estate? It is objected, that it is contingent to whom the estate is to go. But the objection of contingency, if any, arises from the uncertainty as to the amount of the assets. The Revised Statutes, c. 109. s. 62, make executors and administrators subject to the process of foreign attachment. And if the construction contended for by the trustee is correct, that he is not liable to be summoned as such until the share in his hands, belonging to a distributee, is ascertained by a decree of the probate court, the statute could be easily avoided. Under the same section of the statute it might equally well be contended, that an executor or administrator should not be held as trustee of a creditor of the deceased, because the estate may prove insolvent, and the amount to be received as a dividend upon such debt could not have been ascertained by the trustee when he should make his answer.

Some of the early cases, where it was held, that a trustee should be discharged on account of the contingency attending the principal's claim upon him, were decided upon the ground of protecting the trustee, he not being at liberty to answer anew upon *scire facias*. That reason has been removed by the authority now given to courts to examine a trustee anew upon *scire facias*.

Questions like the present have frequent-

ly arisen under the former law of assignments by debtors of their property, and the court have never discharged the trustee unless he discloses in his answer, that the amount of debts of those who have become parties to the assignment exceed the amount of assets in his hands.

In this case the trustee admits a balance in his hands, and, if charged, will have a right to answer further on *scire facias*, when that balance can have been ascertained.

A question was raised at the argument, whether the distributive share of the wife is liable to be taken by a trustee process for the debt of the husband before he has reduced such share to his possession.

The court are of opinion, that it is. The process of foreign attachment operates as an equitable assignment of this right of the husband, and if prosecuted is equivalent to a reducing of the claim to possession by the husband. Nor does this conflict with the principle of the case of *Hayward v. Hayward*, which has been determined the present term, since nothing had been done in that case by the husband or his creditors to appropriate the share of the wife to his benefit.

The trustee was accordingly charged, and upon motion, the action was continued to enable the trustee to ascertain the balance in his hands belonging to the principal debtor, and answer further.

ENGLISH CASES.

COURT OF QUEEN'S BENCH.

TRINITY TERM, 1838.

Lyall v. Martin.

Where a servant does something which is unlawful, though it may be done by him with a view to his master's benefit, the master cannot be responsible for it. In such a case the authority of the master cannot be implied.

Mr Humphrey moved for a rule to show cause why the nonsuit entered in this case by *Mr Justice Coleridge* should not be set aside and a new trial granted. This was an action of trespass for taking the plaintiff's horse. The defendant pleaded, first, Not Guilty: secondly, that the defendant was lawfully possessed of a certain close; that the horse strayed into the close, and that the defendant lawfully distrained it. Replication, that the close before the time, &c. was next to a certain highway, and that the horse in question, being upon the highway, was wrongfully drawn by the defendant into his close; and that the horse was only in the close by the wrongful doing of the defendant. The rejoinder took issue on this replication. It appeared at the trial that the plaintiff and defendant both lived near the Penitentiary at Milbank, and both had some garden ground there. The plaintiff's horse was in the highway, and near to the defendant's close. It trespassed on the defendant's close, and was drawn out by the defendant's servant, who followed it into the high road, and caught it there and impounded it. The question intended to be raised was, whether the master was answerable for this act of his servant. The learned judge thought that the master was not answerable in the present case, and therefore nonsuited the plaintiff. That nonsuit cannot be supported. In the *Attorney General v. Siddon*, (1 Tyr. 41; 1 Cro. & J. 220,) a master was held answerable for an illegal act of his servant, if within the scope of his probable authority, and done for the master's benefit. Both these things are true of the act done by the servant in the present case. At all events, the facts here ought to have gone to the jury for them to say whether the act was not within the authority given to the servant by the master; and whether it was not done for the master's benefit. *Gregory v. Piper*, (9 Barn. & C. 591,) decided that the master was liable for the act of the servant in the course of executing his orders with ordinary care, a trespass having been committed notwithstanding such care on the part of the servant. In *Tuberville v. Stamp*, (1 Ld. Raym. 264,) *Lord Holt* said that as the servant there had acted in the way proper for his employment, though he had no express command of his master, yet his master should be answerable, for it should be intended that the servant had authority from the master, the act being for the master's benefit. That principle was fully adopted in *Brucker v. Fromont*, (6 Term Rep. 659,) where the court distinctly referred to, and held itself bound by *Lord Holt's* authority. It is clear, therefore, that the facts here ought to have been left to the jury, and if they found that the act was for the master's benefit, he would be liable for it to the plaintiff.

Denman, C. J.—I think that the course pur . by the learned judge at Nisi Prius was right. This was a wrongful act of the servant, and nothing wrongfully done by the servant can be taken impliedly to have been done by the command of the master. For anything which appeared at the trial, the master authorised the servant to do only that which was lawful. Suppose the horse had been taken on the grounds belonging to the defendant, the special plea would have been proved, but that is now out of the question. This is a wrongful act of the servant, which is altogether different from the negligent doing of a lawful act, which the master has authorised. The latter may be referred to the authority of the master, and he will therefore be liable for it. But the former cannot be referred to his authority, and he is, therefore, with respect to it, exempted from responsibility. That was the principle in the cases to which reference has been made, and not one of which goes so far as the present.

Mr Justice Littledale concurred.

Mr Justice Patteson.—I am of the same opinion. The cases cited do not go the length of the present. In all of them the circumstances showed that they were acts done by the authority of the master, or in the performance of that which might be reasonably implied to be within the scope of his authority. That is not so here. On the contrary, the servant has done something which is utterly unlawful. The master, therefore, cannot be responsible, and the nonsuit was right.

Mr Justice Williams concurred.

COURT OF COMMON PLEAS.

TRINITY TERM, 1838.

Coupland v. Cooke.

A writ of summons having been left at the usual place of business of a defendant, and on the declaration being served, a summons for time to plead being taken out, the court will not subsequently allow the defendant to set aside the declaration and all subsequent proceedings, on the ground that he had never been served with the writ of summons.

Bayly showed cause against a rule *nisi*, obtained by *Humphrey*, for setting aside the declaration and all subsequent proceedings in this action, on the ground that the defendant had never been served with, or had received any writ of summons or other process in the suit. It was submitted that the defendant had waived the objection by taking out a summons for further time to plead after the delivery of the declaration. He cited *Williams v. Strahan*, (1 New Rep. 309,) where it was held that if a defendant accepted a declaration, and acted as if an appearance had been entered for him, the court would not afterwards permit him to set aside a judgment for want of an appearance having been entered. The party in the present case had taken a step, and must be taken to be within the rule laid down in that case, and it was besides sworn that the writ of summons was served at his place of business.

Humphrey, in support of the rule, stated that the declaration here had not been actually served on the defendant, but only a notice of declaration. On his receiving it, he went to an attorney, who told him to take out a summons for time to plead, which he ignorantly did.

Tindal, C. J.—The answer to you is, that the defendant knew he was served with the copy of the writ of summons. He was bound to state his whole case to his attorney.

Humphrey said that the defendant positively denied that he knew anything of the writ of summons having been issued, until he was served with the notice of declaration.

Tindal, C. J.—There is sufficient reason to say that the defendant took a step in the cause, and the rule must be discharged.

Rule discharged.

HOME CIRCUIT.

MAIDSTONE ASSIZES, AUGUST, 1838.

The Queen v. Mears and others.

Where a man of unsound mind commits a murder, persons present, though aiding and abetting him by their presence, cannot be convicted as accessories; but they may be convicted as principals.

If several persons assemble together, though without any distinct or definite object, but with the general purpose of resisting lawful authority, and one among the number kills another person, all so assembled may be indicted for murder.

If the persons assembled, influenced by personal fear of their leader, keep together, they are nevertheless responsible for acts done by him while they are so assembled, and aid and abet him by their presence.

THOMAS MEARS, otherwise Tyler, and William Price, were indicted for the murder of one Nicholas Mears. The first count of the indictment stated, that one John Thom, alias Courtenay, on the 31st of May, at the ville of Dunkirk, near Canterbury, by a pistol bullet, feloniously and of his malice aforethought, killed &c. Nicholas Mears, and that the prisoners aided and abetted the said Thom in committing the said felony and murder. The second count charged them as principals.

Mr Law, Mr Serjt. Andrews, Mr Bodkin, and *Mr Channell,* appeared for the prosecution.

Mr Shea and *Mr Deedes,* conducted the defence.

It was proved, that Thom, who likewise called himself Sir W. Courtenay, was a person who pretended to be the Saviour of the world,—that he assembled together a great number of persons, led them about the country, promised them plenty in this world, and happiness in the next; that he set himself above all earthly authority, and that, on one occasion, the prisoner Tyler having said to him, "Sir William, I heard a man say the other night, that you were a fool and an impostor, and that he should not mind taking you," Courtenay answered, "If any one comes, I shall try my arm; I can clap my left hand on my right arm and slay 10,000 men. If the constables come, I shall cut them down like grass." Within two days after this, Courtenay having made much disturbance in the country, Dr Poore, a justice of the peace, issued a warrant for his apprehension. This warrant was put into the hands of John Mears, who was a cousin of the prisoner Tyler, and constable of Boughton, within which parish Dunkirk is situated, and he took with him assistants, his brother Nicholas Mears, and a man named E lwards. Courtenay and his party were then at a house called Bossenden house, in a wood of that name, the men being disposed in and about the house somewhat like guards, and being armed with bludgeons. The two prisoners gave notice to Courtenay that the constables were coming, on which he said something to Tyler, who turning to them, said, "Step forward." They did so, when Courtenay coming up to them, asked, "Are you the constables?" The deceased answered, "I am;" on which Courtenay instantly shot him, then drew a dagger and struck at John Mears, who ran away, and after being chased by Courtenay for a short distance, escaped. Edwards also escaped. Courtenay then came back and drew a sword, and in the presence of all the men, hacked and wounded Nicholas Mears in a horrid manner; after which the two prisoners, with two others, by Courtenay's order, carried the dying man, and threw him into a dry ditch, where they left him, and then all returned to the house to breakfast. Courtenay, while at breakfast with his men, said, speaking of Nicholas Mears, "I have killed his body, but I have saved his soul."

Lord Denman, C. J., in his charge to the jury, read the indictment, and then said;—Murder is the act of feloniously, wilfully, and of malice aforethought, destroying life. In order to make out the charge which imputes to Courtenay the act of murder, and that these persons were guilty in aiding and abetting him to commit the same, it would be necessary to show that Courtenay was a person capable of committing that murder. In order to make out the malicious intention imputed in the indictment to the act of Courtenay, he must be shewn to have been of sound mind at the time when he committed it, for it is a maxim of law, that persons not of sound mind cannot be held responsible for their acts. It seems to me, therefore, that if it appears in evidence, that Courtenay was not, at the time of committing the act, of sound mind, you must acquit the prisoners upon the first count of the indictment, for there will be no foundation on which the accessary crime can rest. I must own that the impression on my mind is, that he was a man of unsound mind. I think, too, that if he was now before us on his trial, you could not safely say, that he was in a condition to be answerable for his act. It is not an opinion which I mean to lay down as a rule of law to be applicable to all cases, that fanaticism is a proof of unsoundness of mind; but there was in this particular instance, so much religious fanaticism—such violent excitement of mind—such great absurdity and extreme folly, that if Courtenay was now on his trial, it could hardly be said from the evidence, that he could be called on to answer for his criminal act. Then, that simplifies the question you will have to decide, and

confines it to the second count of the indictment. There, these persons are themselves charged with having committed the offence, and if they were aware of the malignant purpose entertained by Courtenay and shared in that purpose with him, and were present aiding, abetting and assisting him in the commission of acts fatal to life in the course of accomplishing this purpose, then no doubt they are guilty as principals on this second count. In Hawkins's Pleas of the Crown, c. 31. s. 46, it is said, "where divers persons resolve generally to resist all opposers in the commission of any breach of the peace, and to execute it in such a manner as naturally tends to raise tumults and affrays, and in so doing, happen to kill a man, they are all guilty of murder, for they must at their peril abide the event of their actions who wilfully engage in such bold disturbances of the public peace, in open opposition to, and defiance of the justice of the nation." But in that case, the fact must appear to have been committed in prosecution of the purpose for which the party assembled. Here it is argued, that as Courtenay and his followers are not shewn to have had any distinct and definite purpose in view in assembling together, there could not be any general combination for the execution of any such purpose, and the defendants must therefore be acquitted. I think, that the evidence will lead you to a very different conclusion. It seems to me wholly unimportant whether the parties had a well defined and particular mischief to bring about as the result of their combination; because I think if their object was "to resist all opposers in the commission of any breach of the peace," and, that for that purpose, the parties assembled together and armed themselves with dangerous weapons, in that case, it appears to me, that, however blank might be the mind of Courtenay as to any ulterior purpose, and however the minds of the prisoners might be unconscious of any particular object, still if they contemplated a resistance to the lawfully constituted authorities of the country, in case any should come against them while they were so banded together, there would be a common purpose, and they would be answerable for anything which they did in execution of it. If any man is found aiding another, of whose ill intentions he is thoroughly apprised, he is responsible. It will be for you to say whether, from what was done by these men both before and after the killing of Nicholas Mears, they did not intend this general resistance to the law. [His Lordship then referred at large to the evidence, and afterwards continued thus.] In speaking of malice aforethought, the expression does not mean "premeditated personal hatred or revenge against the person killed;" but that kind of unlawful purpose, which, if persevered in, must produce mischief "such as is accompanied with those circumstances that shew the heart to be perversely wicked, is adjudged to be guilty of malice *prepense*," c. 31. s. 46. With regard to the argument you have heard, that these prisoners were induced to join Courtenay, and to continue with him from a fear of personal violence to themselves, I am bound to tell you, that where parties for such a reason are induced to join a mischievous man, it is not their fear of violence to themselves which can excuse their conduct to others. You probably, gentlemen, never saw two men tried at a criminal bar for an offence which they had jointly committed, where one of them had not been to a certain extent in fear of the other, and had not been influenced by that fear in the conduct he pursued; yet that circumstance has never been received by the law as an excuse for his crime, and the law is, that no man from a fear of consequences to himself, has a right to make himself a party to committing mischief on mankind. You will, therefore, say whether these two men were so far cognisant of an illegal purpose in Courtenay, and joined in his acts, that they are guilty of the murder which the hand of Courtenay committed. You will say, whether they were abetting Courtenay in the blow he gave the deceased; for if they were, the blow of Courtenay was the blow of them all, and they are answerble for it. If you think that they kept together with the knowledge of any general purpose of resistance to the law, then they are guilty. It cannot be too often repeated, that the apprehension of personal danger, does not furnish any excuse for assisting in doing any act which is illegal. You will, therefore, discard that as an excuse, and say whether you find that Courtenay was a dangerous and mischievous person; that these two prisoners knew he was so, and yet kept with him, aiding and abetting him by their presence, and concurring in his acts; and if

you do, you will find them guilty, for they are then liable as principals for what was done by his hand.

The jury returned a verdict of not guilty on the first count, and guilty on the second; but recommended the prisoners to mercy in consequence of the infatuated manner in which they had been led away by the maniac Courtenay.

On the following day, (Aug. 10,) several others of Courtenay's followers were indicted as accessories and as principals in the murder of Lieutenant Bennett of her majesty's 45th regiment. The deceased had been sent out with some soldiers to apprehend Courtenay, as the murder of Mears had shewn that such apprehension could not be effected without military aid. Courtenay shot the deceased as soon as he advanced from the line to call on Courtenay to surrender.

Mr Clarkson appeared for some of the prisoners; *Mr Shea* and *Mr Deedes*, for the rest.

The counsel for the prisoners said, that after the opinion of the lord chief justice, delivered on the previous trial, it would be impossible to contend that the prisoners were not guilty of murder, and therefore they submitted to a verdict of guilty.

DIGEST OF AMERICAN CASES.

Selections from 12 Peters's (U. S.) Reports.

GUARANTY.

The rule is well settled, that the guarantor of a promissory note, whose name does not appear on the note, is bound without notice, where the maker of the note was insolvent at its maturity; unless he can show he has sustained some prejudice by want of notice of a demand on the maker of the note, and notice of non-payment. *Reynolds and another v. Douglass and another*, 497.

INSURANCE.

1. By the well settled principles of law, in the United States, the state of the facts, and not the state of the information at the time of the abandonment, constitutes the criterion, by which it is to be ascertained whether a total loss has occurred or not, for which an abandonment can be made. If the abandonment when made is good, the rights of the parties are definitively fixed; and do not become changed by any subsequent events. If, on the other hand, the abandonment when made is not good, subsequent circumstances will not affect it; so as retroactively to impart to it a validity which it had not at its origin. *Bradlie v. The Maryland Insurance Company*, 378.

2. In cases where the abandonment is founded upon a supposed technical total loss, by a damage or injury exceeding one half the value of the vessel; although the fact of such damage or injury must exist at the time, yet it is necessarily open to proof, to be derived from subsequent events. Thus, if the repairs, when subsequently made, clearly exceed the half value, it is plain that this affords one of the best proofs of the actual damage or injury. On the other hand, if the subseqent repairs are far below the half value, this, so far as it goes, affords an inference the other way. In many cases of stranding, the state of the vessel may be such, from the imminency of the peril, and the apparent cost of expenditures requisite to deliver her from it, as to justify an abandonment; although, by some fortunate occurrence, she may be delivered from her peril wiihout an actual expenditure of one half of her value, after she is in safety. Where, in the circumstances in which the vessel then may have been, in the highest degree of probability, the expenditures to repair her would exceed half her value, and if her distress and peril be such as would induce a considerate owner, uninsured, and upon the spot, to withhold every attempt to get the vessel off, because of such apparently great expenditures; the abandonment would, doubtless, be good. *Ib.*

3. In respect to the mode of ascertaining the value of the ship, and, of course, whether she is injured to the amount of half her value, it has, on the fullest consideration been held by the supreme court, that the true basis of the valuation is the value of the ship at the time of the disaster; and, that if after the damage is or might be repaired, the ship is not or would not be worth, at the place of repairs, double the cost of repairs, it is to be treated as a technical total loss. *Ib.*

5. The mere retardation of the voyage, by any of the perils insured against, not amounting to or producing a total incapacity of the ship eventually to perform the voyage, cannot, upon principles well established, be admitted to constitute a technical total loss, which will authorise an abandonment. A retardation for the purpose of repairing damage from the perils insured against, that damage not exceeding one moiety of the value of the ship, falls directly within this doctrine. Under such circumstances, if the ship can be repaired, and is repaired, and is thus capable of performing the voyage, there is no ground of abandonment founded upon the consideration that the voyage may not be worth pursuing, for the interest of the ship owner; or that the cargo has been injured so that it is not worth transporting further on the voyage: for the loss of the cargo for the voyage has nothing to do with the insurance upon the ship for the voyage. *Ib.*

6. An insurance on time, differs as to this point, in no essential manner, from one upon a particular voyage; except in this, that in the latter case, the insurance is upon a specific voyage described in the policy; whereas a policy on time insures no specific voyage, but it covers any voyage or voyages whatsoever, undertaken with, and not exceeding, in point of duration, the limited period for which the insurance is made. But it does not contain an undertaking that any particular voyage shall be performed within a particular period. It warrants nothing as to any prolongation or retardation of the voyage; but only that the ship shall be capable of performing the voyage undertaken, notwithstanding any loss or injury which may accrue to her during the time for which she is insured; and of repairing it, if interrupted. *Ib.*

MISCELLANY.

THE LEGAL PROFESSION.

It is undoubtedly a matter of congratulation to those of our readers who are aware of the fact, that the newspaper press in many parts of the country has manifested unusual solicitude of late, for the welfare, spiritual and temporal, of the legal profession. We have before us a pile of newspapers of no inconsiderable dimensions, which contain so much entertaining matter on this subject, that we are tempted to make some choice extracts for the benefit of those, who are not so fortunate as ourselves.

One of these periodicals, published, we believe, some two hundred miles eastward from the spot "whereon we stand," and which rejoices in the high sounding title of the *Northern Statesman*, appeared on the 18th ultimo, with a leader of some three columns, in which is discussed, as appears by the title—*The Profession of Law—its tendency and importance—The Practitioners of Law, their influence in society and their means of doing good or evil.*

After some remarks, showing what lawyers may be, and sometimes are, the editor proceeds,—

"It is, however, too often the case, that young men, either of their own volition, or that of friends, enter the profession, without the *principles*, *talents* or *industry*, suited to its multifarious duties. They enter the office of some lawyer, who is postmaster, or holds some other office, the duties of which require one third of the student's time—another third is devoted to *pleasure and politics*—leaving the remaining third to study—and after thus wearing away *three years* of the prime of life in his *pretended* studies, he is admitted to practice with less actual knowledge of the science and philosophy of law, than a smart, industrious man would acquire in six months, assiduous study—or than many of our best informed merchants really possess. During a few of the first terms of the court after his admission, he will be very attentive to his business, in the preparing and arranging of his causes—in closing them up, and paying over the proceeds to his clients. But in too many instances he soon settles down into a kind of listless indifference, passes most of his time sauntering about town, or dabbling in politics; seldom shaking the dust from his stinted and forsaken library, and by neglecting his business—permitting his clients' demands to remain in his office unattended to—their causes to hang along year after year, either undecided in court, or in uncollected executions in the hands of some long-winded office-seeking sheriff—until the costs and interest have equalled the principal—the defendants have died or moved away—the client's patience becomes worn out, and his spirits broken down, between injustice and

oppression on the one hand, and professional imbecility and neglect on the other. The natural and legitimate result of all this, is, the lawyer's loss of confidence, business and resources—and to his clients and the community, a disgust of legal proceedings, and a contempt for the practitioners of law. Such counsellors do great dishonor to themselves and to their profession—and set a bad example to their juniors. They appear to think, in the language of a celebrated modern politician, that "*It is glory enough to have served under such a chief*," as the *name* of 'A Lawyer.' The Poet, however, says that,

> 'Honor and shame from no condition rise,
> Act well your part, there all the honor lies.' "

Our editor then comes to the second branch of his subject, to wit:—"Unprincipled Lawyers;" and here his indignation knows no bounds. He accuses this class of men of all manner of evil things, such as exciting suspicion and ill will between neighbors—forging and altering notes—buying up notes—commencing vexatious suits, and he asserts, that "they will trustee *clergymen*, *deacons*, and others, without the least cause or reason whatever." They will also bring fictitious suits in order to "give themselves an opportunity to '*cut a great swath*,' in a distant court, and appear more like a disgusting '*bag of wind*,' than any thing that is *just*, *liberal* and *manly*."

By way of "Conclusion," it is objected, among other things, that lawyers are inordinately selfish, because they sometimes refuse to labor unless they are sure of receiving an adequate compensation. In such cases, it is said, "they almost invariably say, that they 'don't do any such business,' and that the applicant 'better go to squire such a one, he does all such business.' Now to our mind these transactions show a cold-hearted *selfishness*, and a disposition to monopolize all the pleasant and lucrative portions of legal business, and at the same time to shove upon other shoulders all the unprofitable, laborious, and vexatious portions which often subject a magistrate to great inconvenience, and to the lasting ill-will of the complainant or accused, which are highly unjust and disreputable to the profession—and deserve the severe animadversion of the public. In a country like this, every man ought to be willing to take the *bitter* with the *sweet* of his calling, and to bear his just proportion of the public burthen."

So much from the *Northern Statesman*. Throwing this aside, we next come to some score of newspapers, English and American, in which is copied a paragraph, attributed to Lord Brougham, and which is generally followed by editorial remarks, more or less interesting, but for which, we are sorry to say, we have no room at present. The editor of the Boston Mercantile Journal, in particular, expresses himself sorely puzzled to know how a lawyer can act conscientiously in taking up with any and every case, and his difficulty is increased by his Lordship's *dictum*, which is as follows.

"An advocate, by the sacred duty which he owes his client, knows in the discharge of his duty but one person in the world—that client, and none other. To save the client by all expedient means, to protect that client at all hazards and costs to all others, and among those others to himself, is the highest and most unquestioned of his duties; and he must not regard the alarm, the suffering, the torment, the destruction, which he may bring upon any other. Nay, separating even the duties of a patriot from those of an advocate, and casting them, if need be, to the wind, he must go on, reckless of the consequences, if his fate should unhappily be to involve his country in confusion for his client's protection."

The Boston Morning Post, thinks that the following rule for advocates, laid down by Mr Parker, the Commonwealth's Attorney for Suffolk, in a recent trial, are "rather more plausible than Brougham's."

"It is the duty of a counsel not to be a witness against his client, either by word or act. Even if his client should tell him that he is guilty, he is bound not to take it to be so; for his client, through ignorance of the law, or the nature of the evidence requisite to warrant a conviction, may suppose himself guilty, under the law, when in fact he is not, although he may have committed some great moral wrong. Even if the counsel be morally convinced of his client's guilt, he is not to act on that presumption, for he, in his turn, may also be mistaken in the weight of the testimony, and some principle of law involved in the case. Every man is to be tried by the law and the evidence, and the court and

the jury are the only judges, known to the law, upon those two points, and not the counsel. His duty is simply to strive to lead the jury to a verdict of 'not guilty;' and if he misleads them to such a verdict, the responsibility is theirs, and not his."

If professional gentlemen, after reading the foregoing, are not enlightened as to their characters and duties, it would seem to be their own fault. It might be deemed presumption in us to offer any remarks upon a subject, which, as popular orators love to say, has been so completely exhausted, and we shall conclude with an extract from Mr Montagu's eloquent and interesting Essays and Selections, lately published.[1] Previous to this, however, we will extract the concluding sentence of a most excellent Introductory Lecture, delivered at the present term in the Law School in Cambridge, by the Royall Professor of Law.

"Here, for the present," says Mr Greenleaf, "I leave the subject; but not without first calling your attention to a plain duty of the advocate, resulting from this view of the common law. I mean the duty of never misleading the judge, but rather of always endeavoring to assist him in coming to a right decision. He should present the case of his client, fairly, fully, and truly, before the court; but should remember, that, in the judgment to be pronounced upon it, the whole community are concerned, as it may form a precedent for future decisions; and that, however interesting a victory may be to his client, the public, as well as himself, have a far deeper interest in the triumphs of the law."

Mr Montagu's essay, which is after the manner of Fuller, is upon THE DUTIES OF A BARRISTER, and he considers the subject in two points of view. 1. *His duty to himself*, and 2. *His duty to his client.* We have room for the first part only, at present, which is as follows:—

1. *Before he engages as a student he considers his health.*—Whether it will enable him to encounter sedentary confinement, continued intensity of thought, the exertion of long and frequent pleadings in hot and crowded courts, and the anxiety ever attendant upon the consciousness of being intrusted with the happiness of others.

2. *He considers the fitness of his intellect for the profession of the law.*—Whether he has invention to find, judgment to examine, memory to retain, and a prompt and ready delivery. He is mindful that a man may be miserable in the study of the law, who might have been serviceable to his country at the spade or the plough.

3. *He duly considers his motive for engaging in the profession.*—It is not fame, but honorable fame; it is not wealth, but wealth worthily obtained; it is not power, but power gained fairly and exercised virtuously; it is not the promising and pleasing thoughts of litigious terms, fat contentions, and flowing fees, but the heavenly contemplation of justice and equity. His plans will not be subservient to considerations of rewards, estate, or title; these will not have precedence in his thoughts, to govern his actions, but follow in the train of his duty.

He enters his profession, mindful of the admonition of Lord Bacon. "We enter into a desire of knowledge, sometimes from a natural curiosity and inquisitive appetite; sometimes to entertain our minds with variety and delight; sometimes for ornament and reputation; sometimes to enable us to victory of wit and contradiction; and most times for lucre and profession; and seldom sincerely to give a true account of our gift of reason, for the benefit and use of man:—as if there were sought in knowledge a couch whereupon to rest a searching and restless spirit; or a terrace for a wandering and variable mind to walk up and down, with a fair prospect; or a tower of state for a proud mind to raise itself upon; or a fort or commanding ground for strife and contention; or a shop for profit or sale; and not a rich store-house for the glory of the Creator, and the relief of man's estate."

4. *He is careful of his health.*—He remembers that the foundation of happiness in life, and of excellence in his profession, is health of body. His rule, therefore, is, *ne quid nimis.* He is warned by an eminent lawyer, who said, "I will not set up more than three nights together for any attorney in London." He remembers the admonition of Lord Bacon, "Although the world to a christian travelling to the land of promise be, as it were, a wilderness, yet that our shoes and vestments be

[1] Essays and Selections, by BASIL MONTAGU, Esq. London. Pickering, 1837.

less worn away while we sojourn in the wilderness, is to be esteemed a gift coming from divine goodness."

5. *He is industrious.*—"I have two tutors," said King Edward to Cardan, "Diligence and Moderation." So our student will be on his guard against indolence, fickleness, irresolution, immoderate love of amusements, and against every ensnaring and dissipated habit; the natural effect of an overgrown, wealthy, and luxurious capital.

6. *He stores his mind with the general principles of law.*—The tutor to King Edward the Sixth said, "I will not debase my royal pupil's mind with the nauseated and low crumbs of a pedant, but will ennoble it with the free and high maxims of a statesman. The stream must fail which is not supplied from the fountain."

Lord Bacon, in his entrance on Philosophy, says: "And because the partitions of sciences are not like several lines that meet in one angle; but rather like branches of trees, that meet in one stem; which stem, for some dimensions and space, is entire and continued, before it break and part itself into arms and boughs; therefore the nature of the subject requires, before we pursue the parts of the former distribution, to erect and constitute *one universal science*, which may be the mother of the rest; and that in the progress of sciences, a portion, as it were, of the common highway may be kept, before we come where the ways part and divide themselves." And in his entrance on the science of Human Nature, he thus speaks to the same effect:

"Now let us come to that knowledge, whereunto the ancient oracle directeth us, which is the knowledge of ourselves: which deserves the more accurate handling by how much it toucheth us more nearly. This knowledge is to man the end and term of knowledges; but of nature herself, a portion only. And generally let this be a rule, that all divisions of knowledges be so accepted and applied, as that they may rather design forth and distinguish sciences into parts, then cut and pull them assunder into pieces; that so the continuance and entireness of knowledges may ever be preserved. For the contrary practice hath made particular sciences to become barren, shallow and erroneous, while they have not been nourished, maintained, and rectified, from the common fountain and nursery. So we see Cicero, the orator, complained of Socrates, and his school, that he was the first that separated philosophy and rhetoric; whereupon rhetoric became a verbal and empty art."

Our lawyer, therefore, studies the law of laws—"justitia universalis,"—the fixed poles which, however the law may turn, stand immoveable.

7. *He studies human nature.*—He remembers the maxim, "Pour diriger les mouvemens de la poupee humaine, il faudroit connoitre les fils qui la meuvent." He remembers the words of Lord Bolingbroke: "I might instance in other professions, the obligations men lie under of applying themselves to certain parts of history, and I can hardly forbear doing it in that of the law; in its nature the noblest and most beneficial to mankind, in its abuse and abasement the most sordid and the most pernicious. A lawyer now is nothing more, I speak of ninetynine in a hundred at least, to use some of Tully's words, '*nisi leguleius quidum cautus, et acutus, præco actionum, cantor formularum, auceps syllabarum:*' but there have been lawyers that were orators, philosophers, historians: there have been Bacons and Clarendons. There will be none such any more, till in some better age, true ambition of the love of fame prevails over avarice; and till men find leisure and encouragement to prepare themselves for the exercise of this profession, by climbing up the 'vantage ground' of science, instead of grovelling all their lives below, in a mean but gainful application to all the little arts of chicane. Till this happen, the profession of the law will scarce deserve to be ranked among the learned professions: and whenever it happens, one of the 'vantage grounds to which men must climb, is metaphysical, and the other historical knowledge. They must pry into the secret recesses of the human heart, and become well acquainted with the whole moral world, that they may discover the abstract reason of all laws: and they must trace the laws of particular states, especially of their own, from the first rough sketches to the more perfect draughts; from the first causes or occasions that produced them, through all the effects, good and bad, that they produced."

8. *He studies the law which he is to practise, with due consideration of the law of other countries,*—and, that he may practise with ef-

fect, he is not unmindful that eloquence is to knowledge what colors are to a picture.

9. *He is careful of his times of recreation.*—He never forgets the old adage, "Tell me your amusements, and I will tell you what you are." He knows that the employment of times of recreation, is susceptible of every variety between the lowest sensuality and the highest intellectual pleasures: between the "silence of Archimedes in his study, and the stillness of a sow at her wash;" between the drunken revelries of Jefferies, and the calm occupations of Sir Matthew Hale.

"When a magistrate," says the author of the life of the Chancellor de l'Hopital, "returned to his family, he had little temptation to stir again from home. His library was necessarily his sole resource; his books his only company. To this austere and retired life, we owe the Chancellor de l'Hopital, the President de Thou, Pasquier, Loisel, the Pithous, and many other ornaments of the magistracy."

10. *When his name is up, his industry is not down.*—He does not think it virtuous to plead by his credit, but by his study. This is the duty of the good advocate; but commonly physicians, like beer, are best when old; and lawyers, like bread, when they are new and young.

11. *He relies with confidence upon the power of industry and integrity.*—He does not doubt the truth of the old maxim, "Good counsellors never lack clients." Long suffering is a lesson in every part of our lives; in no part of life is it more necessary than in the arduous profession of the law: the greatest men it has produced, have, at some period of their professional lives, been ready to faint at their long and apparently fruitless journey; and they would have fainted, had they not been supported by a confidence in the power of character and industry by which they broke out into light and glory at the last, exhibiting the splendid spectacle of great talents long exercised by difficulties, and high principles never tainted by any of the arts by which men sometimes become basely rich or dishonorably great.

"I have heard it observed," (says Dugald Stewart,) "that those men who have risen to the greatest eminence in the profession of the law, have been in general, such as had at first an aversion to the study. The reason probably is, that to a mind fond of general principles, every study must be at first disgusting which presents to it a chaos of facts apparently unconnected with each other. But this love of arrangement, if united with persevering industry, will at last conquer every difficulty; will introduce order into what seemed on a superficial view a mass of confusion, and reduce the dry and uninteresting detail of positive statutes into a system comparatively luminous and beautiful.

"The observation, I believe, may be made more general, and may be applied to every science in which there is a great multiplicity of facts to be remembered. A man destitute of genius may, with little effort, treasure up in his memory a number of particulars in chemistry or natural history, which he refers to no principle, and from which he deduces no conclusion; and from his facility in acquiring this stock of information, may flatter himself with the belief that he possesses a natural taste for these branches of knowledge. But they who are really destined to extend the boundaries of science, when they first enter on new pursuits, feel their attention distracted, and their memory overloaded with facts among which they can trace no relation, and are sometimes apt to despair entirely of their future progress. In due time, however, their superiority appears, and arises in part from that very dissatisfaction which they at first experienced, and which does not cease to stimulate their inquiries, till they are enabled to trace, amidst a chaos of apparently unconnected materials, that simplicity and beauty which always characterise the operations of nature."

12. *He considers how his profession may tend to warp his mind.*—He remembers the words of Lord Bacon: "We every one of us have our particular den or cavern, which refracts and corrupts the light of nature; either because every one has his respective temper, education, acquaintance, course of reading and authorities, or from the difference of impressions, as they happen in a mind prejudiced or prepossessed, or in one that is calm and equal." As the divine, from constantly teaching, is in danger of being wise in his own conceit; the physician, from constantly seeing man in an abject state, of losing his reverence for human nature; the soldier, of being ignorant, debauched, and extravagant; so against the idols of lawyers,

moral and mental, our lawyer will be upon his guard.

13. *He is cautious that the indiscriminate defence of right and wrong does not lower his high sentiments, or weaken his love of truth.*—In the constitution of our courts, and of the courts in most, if not in all civilized countries, it has been deemed expedient, for the purpose of eliciting the truth, both of law and of fact, that the judge should hear the opposite statements of experienced men, who in a public assembly, may be more able than the suitors, to do justice to the causes upon which their interests depend. A more efficacious mode to disentangle difficulty, to expose falsehood, and discover truth, was, perhaps, never devised. It prevents the influence of passions, by which truth may be disturbed, and calls in aid every intellectual power by which justice may be advanced.

But however useful this practice may be for the protection of public justice, it is not without danger to the individual by whom it is practised. It has a tendency, unless counteracted by strength of mind and vigilance, to generate in him indifference to truth on other occasions; and, when the distant prospect appears desirable, to induce him not to be very scrupulous as to the foulness of the road over which he has to pass to attain it.

14. *He does not suffer himself to be inflated by imaginary importance.*—Intrusted with the management of other men's concerns; consulted and paid for advice; living in private, or within the circle of men engaged in similar pursuits, have a tendency to inflate us into self-importance. Our lawyer, therefore, does not forget the hint given by Chaucer, in his description of the seargeant-at-law—

> "No where so busy a man as he then was,
> And yet he seemed busier than he was."

Nor does he forget the lawyer in the novel, who was "hurried, and driven, and torn out of his life; and repeated many times, that if he could cut himself into four quarters, he knew how to dispose of every one."

When Cromwell was displeased with Sir Matthew Hale, for having dismissed a packed jury, and, on his return from the circuit, said to him in anger, "You are not fit to be a judge;" all the answer Sir Matthew made was, "It was very true."

15. *His general caution is increased, if he has risen from an obscure situation.*—It is said that mud walls are apt to swell when the sun shines upon them. A quack struts with more solemnity than a regular physician.

16. *He is cautious not to form an improper estimate of the nature of power:* not to mistake what is of the earth, earthly, for what is of the Lord from heaven.—Power to do good is the true and lawful end of aspiring; for good thoughts, though God accepts them, yet towards men, are little better than good dreams, except they be put in act; and that cannot be, without power and place as the 'vantage and commanding ground. Merit and good works, are the end of man's motion; and conscience of the same is the accomplishment of man's rest; for if a man be partaker of God's theatre, he shall likewise be partaker of God's rest. *Et conversus Deus, ut aspiceret opera, quæ fecerunt manus suæ, vidit quod omnia essent bona nimis*, and then the Sabbath.

17. *He is vigilant that his profession may not contract his mind.*—True vision depends upon the power of contracting and dilating the sight. The elephant can rend a tree and pick up a pin. Our lawyer, therefore, remembers that, if law has a tendency to quicken and invigorate the understanding, it may not have the same tendency to open and liberalize the mind.

18. *He does not imagine that knowledge is centered in the law.*—It is said, of a lawyer of the present times, that he used to boast of his never have opened any book but a law-book. The poor man is dead, and will be forgotten with his own pleadings.

Another celebrated lawyer, after a high encomium upon the powers displayed by Bacon in his reading on the statute of uses, says,—"What might we not have expected from the hands of such a master, if his vast mind had not so embraced within its compass the whole field of science, as very much to detract from professional studies."

In the presentation-copy, by Bacon, to Sir Edward Coke, of the "*Novum Organum*," there is written by the hand of Sir Edward, under the handwriting of Bacon—

> Auctori consilium,
> Instaurare paras, veterum documenta sophisma
> Instaura leges, justitiam que prius.

And, over the device of the ship passing between Hercules' pillars—

It deserveth not to be read in schools,
But to be freighted in the ship of fools.

19. *He is cautious that his habitual attention to forms does not make him lose sight of the substance.*—In the year 1765, the important question with respect to the propriety of taxing America, as she was not represented in parliament, was discussed in the house of commons; the debate occupied the attention of the house for three successive days, and called forth all the ability of the country. At the conclusion of the third debate, at three o'clock in the morning, Sir James Marriott, judge of the court of admiralty, rose. He said, "That upon this important subject he could not conscientiously give a silent vote, particularly as the question appeared to him, during the whole argument, to have been entirely mistaken; the question discussed had been with reference to the propriety of taxing America, as she was not represented; whereas in truth and in fact, America was represented: for upon our first landing in America, we took possession of that continent as part and parcel of the manor of East Greenwich, in the county of Kent."

Upon hearing the witches in Macbeth say, "We are doing a deed without a name," a lawyer in the pit exclaimed, "Then it's not worth a farthing."

The lawyer in Hogarth insists that an elector who had lost his arm cannot be sworn, as he cannot take the book in his hand.

20. *He does not suppose all his fellow-creatures under the influence of bad passions, from the effects of vice which he daily witnesses.*—Against this tendency Lord Bacon warns all students; saying, "As the fable goes of the basilisk, that if he see a man first, the man dies; but if a man see him first, the basilisk dies; so it is with frauds, impostures, and evil arts; if a man discover them first, they lose their power of doing hurt: but if they prevent, then, and not otherwise, they endanger."

The young physician, when he attends the hospitals, sees the ruins of human nature; bodies laid up in heaps like the bones of a destroyed town, *hominus precarii spiritus et male hærentis*, men whose souls seem borrowed, and kept there by art and the force of medicine; whose miseries are so great, that few people have charity or humanity enough to visit them; or, visiting them, do more than pity, in civility, or with a transient prayer; but the young man does not, from these sad scenes, infer that all men are thus afflicted. So, our lawyer does not, in his haste, say that all men are liars. When he assists in punishing the robbers, he does not forget the good Samaritan, who bound up the wounds of the way-faring man; and, when called upon to censure the sins of the woman at the feast, he is not unmindful that she may have her store of precious ointment to pour on the feet of her master.

STATISTICS OF CRIME IN BOSTON.

The Revised Statutes of this Commonwealth require the respective prosecuting officers to make an annual report to the attorney general, on the 31st of October, of all business done within the year, by each of them, for the Commonwealth. We have been favored with a sight of Mr. Parker's return, in Suffolk county, for the year ending October 31, 1838, by which it appears, that he has conducted, in the Municipal Court, 481 cases—in the Court of Common Pleas, 51, and in the Supreme Judicial Court, 21; making in all, 553.

The importance of the Municipal Court will appear from the following statement. There were examined by the grand jury, 448 cases, in 80 of which no bills were voted. There have been 286 verdicts within the year, and 11 trials where the jury were unable to agree, making 297 trials by juries. Of the verdicts, 157 were—guilty, and 46 were not guilty. There were 118 pleas of guilty by the prisoners who confessed on arraignment. There were 2 appeals from the Police Court, and 18 appeals to the Supreme Judicial Court. Fiftyone sentences to the state prison gave the aggregate amount of sentences to that prison, 128 years and six months. Ninetythree sentences to the house of correction gave the aggregate amount of sentences to that place, 132 years, making in all, 260 years to hard labor. Eleven young persons were sent to the house of reformation for juvenile offenders. Fifteen cases, commenced last year, were brought forward and finished. Twentyfour persons who were indicted, have not yet been arrested, and 33 have forfeited their bonds.

The county of Suffolk embraces the city

of Boston and the town of Chelsea. Only one offence was alleged to have been committed in Chelsea, and of that, the accused was acquitted.

The salary of the Commonwealth's attorney in the county of Suffolk is $1800, which gives an average of about $3 29 on each of the above cases. When Mr Parker was appointed to his present office his practice as counsel for prisoners was very extensive and profitable. After holding the office one year at a salary of $1200, he found, that he was sacrificing his own interest in serving the public in the capacity of prosecuting officer, and his salary was increased as above.

It would seem from the foregoing statements, that no public officer in the Commonwealth works at a cheaper rate, and certainly none are more faithful to their trust, than the attorney for Suffolk.

ADVERTISING DEBTS.

In an action lately tried in the court of common pleas, in New York City, in which damages were laid at $2000 for a libel, by advertising for sale a demand against the plaintiff, Mr Justice Ingraham is reported to have instructed the jury, that the publication of a debt was not libellous, unless made with bad motives, for very frequently the debts of corporate companies were advertised for sale at auction, in order that a fair price might be obtained for them. If this was done with that intention, it was no libel, but if it was done for the purpose of injuring the plaintiff, it was libellous, and the question then would be, should the defendant respond in damages. The character of the plaintiff was to be taken into consideration in mitigation of damages, but if the jury believed, that the advertisement was inserted with the intent to injure him, he was entitled to their verdict. The jury found for the plaintiff, and assessed damages in the sum of $50.

NEW PUBLICATIONS.

The Law Library, edited by *Thomas J. Wharton*, Esq., and published by John S. Littell, Philadelphia, and by Weeks, Jordan & Co., Boston. Nos. 61, 62, 63, containing:

An Essay on Devises: By *John Joseph Powell*, Esq., Barrister at Law With copious notes and an Appendix of Precedents; also a Treatise on the construction of Devises. By *Thomas Jarman*, Esq., of the Middle Temple, Barrister at Law.

Manual of Political Ethics designed chiefly for the use of Colleges and Students at Law. Part I. By *Francis Lieber*. Boston: Charles C. Little and James Brown, 1838.

Resolves and Private Laws of the State of Connecticut, from the year 1789, to the year 1836. Published by authority of the General Assembly. 2 vols. 8vo. Hartford: John B. Eldridge, 1837.

Reports of Decisions made in the Superior Courts of the Eastern District of Georgia, by Judges Berrien, T. U. P. Charlton, Wayne, Davies, Law, Nicoll and Robert M. Charlton; and in the middle circuit, by Thomas U. P. Charlton. By *Robert M. Charlton*, late Judge of the Superior Courts of the Eastern District. Savannah: T. Purse & Co., 1838.

Pickering's Reports, volume V. 2d ed., with notes by *J. G. Perkins*. Boston: C. C. Little & J. Brown, 1838.

Massachusetts Reports. Volume I. Stereotype ed. with notes by *Benjamin Rand:* Same, 1838.

A Digest of the cases decided and reported in the Superior Court of the city of New York, the Vice Chancellor's Court, the Supreme Court of Judicature, &c., from 1823 to 1836; being a supplement to Johnson's Digest. Philadelphia: Published by E. F. Backus, 1838.

Reports of Cases argued and determined in the Supreme Court of Judicature and in the Court for the Correction of Errors of the state of New York. Vol. XVII. By *John L. Wendell*, Counsellor at Law. Albany, 1838.

Reports of Cases argued and determined in the Court of Chancery of the state of New York. By *Alonzo C. Paige*. Vol. VI. New York, 1838.

Reports of Cases decided in the Supreme Court of Pennsylvania, in the Eastern District. December Term, 1837, and March Term, 1838. Vol. III. By *Thomas J. Wharton*. Philadelphia: Nicklin & Johnson, 1838.

Reports of Cases adjudged in the Circuit Court of the United States, for the Third Circuit. 2d edition. Including two cases decided in the same court, and hitherto unpublished. By *John B. Wallace*. Same.

TO OUR READERS.

The next number of the Law Reporter will contain, among other papers, Professor Greenleaf's Introductory Lecture at the present term in the Law School at Cambridge;—Mr Justice Story's opinion in the case of *Blanchard v. Sprague*, decided at the last term of the United States' Circuit Court in Boston;—Cases from Maine, and probably a portion of the cases argued and determined, during the last month, in the Supreme Judicial Court in Massachusetts.